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IN THE

# Supreme Court of the United States

OCTOBER 1986 TERM

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STACEY LYNN MERKT and
JOHN B. ELDER,

*Petitioners,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

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## PETITION FOR WRIT OF CERTIORARI

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## STATEMENT OF THE ISSUES PRESENTED

I

HAS THE STRICT SCRUTINY STANDARD REQUIRING AN INDEPENDENT COURT DETERMINATION THAT THE GOVERNMENT HAS A COMPELLING STATE INTEREST TO INTRUDE ON RELIGIOUS BEHAVIOR BEFORE CRIMINAL SANCTIONS CAN BE IMPOSED, BEEN ABANDONED AND BEEN REPLACED WITH UNIFORM DEFERENCE TO ANY ACT OF CONGRESS, SUBJECTING IT TO NO SCRUTINY, NOT EVEN THE LAX RATIONAL BASIS TEST?

II

CAN A PERSON BE CONVICTED OF CONSPIRACY WHEN SHE DID NO ACT TO FURTHER THE ALLEGED CRIMINAL CONSPIRACY AND MERELY ASSOCIATED WITH THE ACTORS AS PART OF A RELIGIOUS COMMUNITY?

III

WILL DUE PROCESS ALLOW POLICE TO OFFER AN IN-CUSTODY WITNESS A LIFE AND DEATH INCENTIVE TO IDENTIFY WHO THEY WANT IDENTIFIED?

IV

WHEN POLICE HAVE GIVEN A LIFE AND DEATH INCENTIVE TO AN INCARCERATED WITNESS TO MAKE THE IDENTIFICATION THE POLICE WANT, CAN A "DISASTEROUSLY SUGGESTIVE" PHOTO DISPLAY WHICH FOLLOWS ON THE HEELS OF THAT INCENTIVE SURVIVE CONSTITUTIONAL MUSTER?

B

ALL PARTIES ARE LISTED IN THE CASE CAPTION.

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## OPINION BELOW

The ruling of the Fifth Circuit is in the Appendix. It is File No. 85-2264. The ruling of Justice Hayden Head on the religion issue is in the Appendix and is reported at 601 F. Supp. 1574 (S.D. Tex 1985). The other relevant rulings of the Trial Court are in the Appendix.

## JURISDICTIONAL STATEMENT

1. The opinion being appealed was filed on July 17, 1986.

2. The Petition for Rehearing was filed August 14, 1986 and denied September 4, 1986. The Motion to Withdraw the Mandate and Comply with Fifth Circuit Rules was denied October 7th, 1986.

3. The Honorable Justice Byron White, pursuant to Rule 43, signed an Order on October 28, 1986 enlarging the time to file this Petition for Certiorari until December 3, 1986.

4. Jurisdiction is invoked pursuant to 28 U.S.C. 1254 (1).

## STATEMENT OF THE CASE

This case arises out of the conviction of John B. Elder of five counts of violating 8 U.S.C. §1324 or conspiracy to violate 8 U.S.C. §1324 and the conviction of Stacey Lynn Merkt of one count of conspiracy to violate 8 U.S.C. §1324(a)(2). Ms. Merkt was acquitted of the substantive charges.

## CONSTITUTIONAL PROVISIONS INVOLVED

### Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

### Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval

forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject to the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

## ARGUMENT

### I

### THE STRICT SCRUTINY STANDARD REQUIRING AN INDEPENDENT COURT DETERMINATION THAT THE GOVERNMENT HAS A COMPELLING STATE INTEREST TO INTRUDE ON RELIGIOUS BEHAVIOR BEFORE CRIMINAL SANCTIONS CAN BE IMPOSED, CANNOT BE ABANDONED AND BE REPLACED WITH UNIFORM DEFERENCE TO ANY ACT OF CONGRESS, SUBJECTING IT TO NO SCRUTINY, NOT EVEN THE LAX RATIONAL BASIS TEST.

Faced with a case where religious behavior was criminalized, the Fifth Circuit not only refused to apply the "strict scrutiny" balancing test, but, held no balancing test at all need be applied. This ruling came in a case of great importance to religious communities throughout the country; the John B. Elder and Stacey Lynn Merkt case.

John B. Elder, a catholic, and Stacey Lynn Merkt, a protestant, are religious people who live their lives with a deep adherence to the requirements of their faith. Mr. Elder and his wife, upon becoming familiar with the horrors faced by refugees fleeing Central American wars, answered the call of their church, and with

their four pre-teen children, moved from San Antonio to San Benito, Texas to run the Casa Oscar Romero, a church-sponsored shelter for Central Americans. Stacey Lynn Merkt was selected as a volunteer to help run the shelter.

While working for the Casa Romero, criminal charges were brought against Mr. Elder and Ms. Merkt.

During pre-trial hearings on defense motions to dismiss, numerous religious leaders testified, explaining the non-avoidable duty to assist refugees. The testimony pointed out that central to most religious belief is respect for the sanctity and dignity of human life and the obligation to assist others in danger. The historical basis of churches and practitioners providing refuge or sanctuary is found in nearly every religion and dates back thousands of years.[1]

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[1] The Old Testament commands assistance of refugees.

"Hide those who have been driven out, do not let the refugee be seen. Let those who have been driven out of Moab stay with you; be their refuge against the destroyer." Isaiah 16:3-4.

"When a stranger sojourns with you in your land, you shall not do him wrong. The stranger who sojourns with you shall be to you as the native among you, and you shall love that person as yourself: for you were strangers in the land of Egypt; I am the Lord your God." Leviticus 19:33-34.

The New Testament also commands assistance of refugees.

"When the Son of Man comes in his glory and all the angels with him, he will sit in state on his throne, with all the nations gathered before him. He will separate men into two groups, as a shepherd separates the sheep from the goats, and he will place the sheep on his right hand and the goats on his left. Then the King will say to those on his right hand, 'You have my Father's blessing; come, enter and possess the kingdom that has been ready for you since the world was made. For when I was hungry, you gave me food; when thirsty, you gave me drink; when I was a stranger, you took me into your home; when naked, you clothed me; when I was ill, you came to my help; when in prison, you visited me.'" Mathew 25:31-41.

Many national church organizations had representatives testify and the statements of support from the governing bodies of many more were admitted into evidence.[2]

After several days of hearings, the Honorable Judge Hayden Head ruled:

> "the Court simply finds that Elder fulfilled his christian obligations as he genuinely perceived

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[2] Many major national churches have spoken out in favor of the religious precepts at issue here. Since 1980, hundreds of priests, ministers, nuns and missionaries have been brutally tortured, raped and murdered in El Salvador solely because of their religious work. Over 50,000 citizens have been the victims of vicious murders. The assassination of Archbishop Oscar Romero, while giving mass at the National Cathedral, and the slaying of the mourners at his funeral, was but one example of violence testified about. Days of testimony and thousands of pages of depositions submitted in the lower Court revealed that the constant atrocities have already horribly killed one in every 70 Salvadoran civilians while displacing more than 1/3 of the population. Testimony from clergy of numerous denominations set out the religious mandate of saving human lives when all that is required is to non-violently provide a place to stay, a ride, a meal, a shelter. Contrary to the opinion's statements, this is religious behavior which cannot be shirked or satisfied in other ways.

them to be and Elder presented substantial testimony to support his view of christianity."[3]

The Court's ruling that Mr. Elder and Ms. Merkt were acting upon their genuinely held religious beliefs triggers the constitutional guarantee of free exercise of religion. Because of the constitutional limitation prohibiting the government from interfering in the free exercise of religion, this Court held in Sherbert v Vernor, 374 U.S. 398 (1963), that "it is basic that no showing merely of a rational relationship to some colorable state interest would suffice" to justify governmental restrictions of religious behavior. The government's enforcement efforts must survive the Court's independent "strict scrutiny" examination. This requires the government to:

1. Show a compelling state interest for the application of the

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[3] Judge Vela adopted Judge Head's Findings and made the same Finding regarding Stacey Lynn Merkt.

statute;

2. Show an exception cannot be made for religiously motivated behavior; and

3. Demonstrate that the least restrictive means is used in accomplishing its goal.

This test has been consistently reiterated; Wisconsin v Yoder, 406 U.S. 205, 215 (1972); Thomas v Review Board of Indiana, 450 U.S. 707 (1981).

Despite this precedent, a panel of the Fifth Circuit in a stunning departure from this well-worn balancing test, held that it need not apply the "strict scrutiny" standard in examining the government's ability to criminalize religious behavior. In deserting the "strict scrutiny" test, the panel did not even substitute the rational basis test, but instead, abdicated all judicial review of enforcement of a criminal statute which criminalized religious conduct. The panel's holding was:

> "there can be no doubt that, until Congress changes the border control laws, they must be uniformly obeyed. On this basis alone, the first amendment challenge of Merkt and Elder to their conviction fails."

The panel thus created a rule that constitutional protections are per se inferior to statutory enactments. This would change the law to be that courts would not examine competing interests between the government and the person whose religious behavior has been criminalized, but instead, would uniformly defer to congress. This Court has instructed that the exact opposite is true. Courts have the obligation to assure that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." Yoder at 215.

The decision justifies ignoring the authority of this court as laid out in Sherbert, and its progeny by citing pre-Sherbert case and misconstruing cases where the fact-finding court had found no religious basis to the petitioner's claim of religiously protected behavior. Such cases are off point here where a religious base was found. Compare the court's use of Leary v United States, 383 F.2d 851 (5 Cir 1967) with Peyote Way Church of God v Smith, 742 F.2d 193

(9 Cir 1984) and People v Woody, 394 P.2d 813 (Cal 1964). Here, the fact-finding court determined that Mr. Elder and Ms. Merkt's actions were religiously motivated; thus, those cases are inappropriately relied on.

More disturbingly, the decision cites Bowen v Roy, 106 S.Ct. 2147 (1986) as authorizing a lowering of the standard of scrutiny of governmental intrusion into religious behavior. Although Bowen had splintered opinions, none of them authorized lowering the "strict scrutiny" standard in criminal cases. Chief Justice Burger's opinion took great pains to emphasize that the standard of review be lower only in non criminal cases:

> "We conclude then that government regulation that indirectly and incidentally calls for a choice between securing a governmental benefit and adherence to religious beliefs is wholly different from governmental action or legislation that criminalizes religiously inspired activity ..."

The other opinions would not have lowered the standard in any cases, but here, we have the Fifth Circuit using Bowen as justification for

eliminating constitutional scrutiny altogether. Because Bowen contained a wide divergence of opinions, it is imperative that this distortion of Bowen be quickly weeded out.

The Fifth Circuit panel opinion also claims that because the criminal statute is related to immigration matters, it is not reviewable by the courts as immigration matters are somehow exempt from constitutional review. A similar claim was made before this court in Plyler v Doe, 457 U.S. 202 (1982). However, while the Court recognized that the government has an interest in stemming the flow of illegal entrants and the economic hardship their residence may produce, this Court found that children's access to education is more compelling an interest than generalized border control interest. This is particularly instructive when it is compared with Yoder where free exercise of religion was found more important than education.

After pronouncing that it need not do so, the panel stated that "[I]n an abundance of analytical caution," it would review the Yoder

test as it applied to the case then failed to do so. Rather than "strictly scrutinizing" what specific government interests are involved; whether exceptions to them would defeat the purpose of the statute; and, whether the least restrictive means are utilized to achieve them; the opinion discusses broad generalized goals in precisely the terms rejected in Plyler, and asserts that it must defer to congress on these issues.[4] Thus the panel failed to join the issue and never discussed any specific harm caused by the petitioner's actions. At the trial level, the INS district director testified that an exception to §1324 for religious reasons would not present any enforcement problem.

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[4] The intent of congress to criminalize helping refugees as opposed to commercial coyotes is questionable in light of the fact that it passed the 1980 Refugee Act; twice has passed a sense of the congress resolutions recommending INS grant extended voluntary departure to Salvadorans allowing them to stay here until hostilities cease; recently reduced 8 U.S.C.§1324 to a misdemeanor if not for pay; and over 100 congress persons sent a letter on behalf of Mr. Elder and Ms. Merkt at their sentencing.

When the lower Court has found that the government's action is criminalizing and punishing constitutionally protected religious activities,[5] such an analysis does not satisfy the Court's constitutional obligation to specifically examine the statutes as applied to the circumstances before it.

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[5] The decision quarrels with whether the defendants' religious beliefs really require them to assist refugees and makes suggestion as to how they might fulfill a religious obligation to help those whose lives are in danger. It is not up to the Court to pass judgment on whether ones religious beliefs match the Court's perceptions of what makes sense, but only to pass on whether they are truly held. However, the Fifth Circuit panel's suggestion that collecting money or sending missionaries to El Salvador or preparing legal forms would be a better way to fulfill religious obligations, reflect a total lack of perception of the religious issues and the human realities involved. All three of those activities are done at a cost of millions of church dollars and the lives of numerous clergy. But for a Salvadoran whose name is on a death list, no amount of indirect help from the church will save that life. At the time of this trial, no Salvadoran had ever been granted asylum in the Harlingen district of Texas. It is fanciful to believe that the INS is willing to follow the law and properly redress this problem by following the 1980 Refugee Act.

Mr. Elder stands convicted of giving three children and two adults who had just crossed the border a ride of about twelve miles to a church-run and sponsored shelter where they could find food and shelter. They seldom saw him again. Ms. Merkt, who was not within a thousand miles of Casa Romero at the pertinent time periods, stands convicted of conspiracy to transport the three children and two adults to a bus station, presumably because her car may have been used to give the refugees a ride to the bus station.

Everyday, about 10,000 undocumented people cross our southern border. The number that are given help by churches, thereby alleviating the burden on everyone else, is minuscule.

What the opinion fails to come to grips with, and thus, this Court must grapple with is, what is the specific compelling state interest that requires making the religious non-selfish act of providing a ride of a few miles to those fleeing death, a felony.

This is an important case being carefully

watched by millions of hardworking, law-abiding church people throughout the country and the world. They are confused by the Fifth Circuit's claim that there is no need to scrutinize government's infringement of religious behavior. The panel's statement that "claims of conscience must yield to the twin imperatives of even-handed enforcement of criminal laws and preservation of our national identity as defined by the immigration laws" forgets that in the United States, which began as a sanctuary for people fleeing religious persecution, one of the imperatives of our society is that people can determine their own religious behavior and government can only intrude upon it when it can show the Court it has a strong reason that requires the government to prohibit and punish the religiously required behavior.

## II

## A PERSON CANNOT BE CONVICTED OF CONSPIRACY WHEN SHE DID NO ACT TO FURTHER THE ALLEGED CRIMINAL CONSPIRACY AND MERELY ASSOCIATED WITH THE ACTORS AS PART OF A RELIGIOUS COMMUNITY.

Although originally charged with two substantive counts of transporting illegal aliens and one count of conspiracy to transport, Ms. Merkt was acquitted of all substantive counts. The only conviction against her was one count of conspiracy to transport. The basis of the acquittal was that Ms. Merkt, for over a week before and for several days after the date the refugees were transported and arrested, was in the State of New York; thus, she was in no way involved in their transportation. The refugees' testimony was that the woman who transported them had first spoken to them about that transportation two or three days before they were transported. This happened when the refugee requested a ride to the bus station. Prior to this, no discussion of leaving the shelter had taken place or been contemplated.

Therefore, in that Ms. Merkt was a thousand miles away at the time of this conversation, it could not form the basis of the conspiracy charge against her. Thus, the grounds for Ms. Merkt's conspiracy conviction was the fact that she worked at the religious shelter, the Casa Oscar Romero.[6] The only other evidence regarding Ms. Merkt was that her car, which was kept at the Casa Oscar Romero, may have been used as the automobile that transported the refugees to the bus station. This fact gives serious concerns regarding the appropriateness of a conviction, particularly in light of not only First Amendment religious rights, but also First

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[6] The jury had been acquainted with the fact that she had a prior conviction for transporting which was subsequently reversed by the Fifth Circuit and the case was dismissed at the trial level by the United States attorney. This prior record was brought to the jury's attention during cross-examination of an alibi witness without prior approval from the Court when the Court had specifically required that the prior record could not be gone into without prior Court approval.

Amendment freedom of association rights as is discussed in the companion cases of Scales v United States, 367 U.S. 203 (1961) and Noto v United States, 367 U.S. 290 (1961), and further explored in Yates v United States, 354 U.S. 298 (1957), as well as United States v Spock, 416 F.2d 165 (1 Cir 1969).

Even beyond the failure of the Fifth Circuit to adequately address the freedom of religion issues discussed in the previous argument, a far deeper intrusion into religious expression and association arises uniquely from Ms. Merkt's facts. And that is,: can a person be convicted of a conspiracy to transport an illegal alien based solely upon the fact that she is a known associate and co-religious participant in lawful behavior of a church-operated shelter? We suggest the answer to that question is certainly not. It is essential that the Supreme Court accept certiorari in this case to clarify the troubling broad sweep that this landmark case presently stands for in terms of the right to criminally punish religious behavior even when

that behavior is nothing more than association in lawful activities of a recognized church body when that recognized church body becomes identified with behavior displeasing to the INS.

## III

### DUE PROCESS DOES NOT ALLOW LAW ENFORCEMENT OFFICERS TO OFFER AN IN-CUSTODY WITNESS A LIFE AND DEATH INCENTIVE TO IDENTIFY WHO THE OFFICERS WANT IDENTIFIED.

From the outset, this case was handled very differently than criminal cases normally are handled. The testimony was uniform that typically refugees found on buses are not taken to the anti-smuggling unit for the purposes of interrogation as to who it is who may have transported them. What triggered the difference here was the mention by one of the refugees that sometime when they were in Mexico, they had stayed at a church. For sometime, the INS had been bothered by the negative publicity that they had been receiving from Stacey Lynn Merkt and John B. Elder in the various different talks they were giving at churches and other institutions in the Rio Grande Valley, discussing the plight of refugees who they had met coming from Central America. The litany of unusual conduct in the handling of this case echoed through the testimony of each and every

INS officer who testified. But it culminated in an outrageous procedure. The male refugee, separated from the female refugee, was taken into a room with two agents; he was told that if he "gave them answers they liked, they would let (him) and the children go to Washington". If he did not tell them what they wanted to hear, he would be deported back to El Salvador. The refugee had fled El Salvador in fear of not only his own life, but the lives of the three children accompanying him and his female companion. He testified that to him this was the difference between being allowed to live in the United States or being sent back to El Salvador to his death. It is particularly curious that the promise was not, if he told the truth, he would get to go to Washington, D.C. or if he told them what happened, he would get to go to Washington, D.C., but rather, if he gave them what they wanted to hear, he would get to go to Washington, D.C. Prior to this point in time, the INS agent testified that they were well aware of Stacey Lynn Merkt and John B.

Elder. They had accumulated video tapes of their appearances on television, newspaper clippings of their statements in the press; they were quite unhappy with these two individuals. In their minds, they were convinced that anybody connected with the church assisting refugees would probably be Ms. Merkt and Mr. Elder.

Refugees fleeing El Salvador are familiar with brutal police officials who severely punish noncooperation. The refugee, in this case, witnessed the killing of people by the government merely for not having the appropriate papers in their pocket. The cost of not substantiating police suspicions, be they true or false, is severe and immediate, the reward equally clear. Playing on these well known fears is repugnant to American concepts of justice.

Lego v Twomey, 404 U.S. 477 (1972), LaFrance v Bohlinger, 499 F2d 29 (1 Cir 1974), Jackson v Deno, 378 U.S. 368 (1964) and Mincy v Arizona, 437 U.S. 385 (1978) make clear that coerced testimony is not admissible. Testimony

that is the product of any sort of threat or violence or direct or implied promise is simply not admissible: Gumsby v Wainwright, 596 F.2d 654 (5 Cir 1979). Here, we have the ultimate bribe, a promise of life for compliance, as opposed to possible death for non-compliance to a man who had already fled El Salvador.

The only witness called by the prosecution who ever identified either Ms. Merkt or Mr. Elder was this coerced witness. The other refugee witness who was not subject to the same promises never identified either Mr. Elder or Ms. Merkt. This outrageous tactic standing in and of itself is sufficient to require the suppression of the witness' testimony as fundamentally unreliable and the product of gross government misconduct.

The effect of the coercion of the witness carried right through to the day of trial. The refugee witness stood up prior to giving his testimony, the jury was excused from the room and he demanded that the promises made to him by the government be carried out before he would

testify; thus, dramatically revealing his view that saying what the government wanted was his ticket to remain in the United States.

The children he was so concerned about were held in government custody until just after the trial when they were released and went to Washington, D.C. Today, Mr. Mendez-Valle lives in the Washington area, as does his female traveling companion (who is believed to now possess a green card), and the three children who were with him.

What makes this bribe particularly disturbing is the manner in which it exploits the refugee's terror to get him to say whatever the government would have him say. It is devoid of any indicator of reliability. A refugee under these situations will be far more likely to give false identification than an accurate one, particularly if he has been helped by a coyote or by some other person who might be in a position to help other members of his family escape the treacheries that have already claimed the lives of over 50,000 of his fellow

countrymen. For an American law enforcement official to use this technique, and thereby inject into the system unnecessary creators of unreliable testimony and evidence, is inexcusable. No legitimate purpose is served by allowing government officials to offer frightened people who come from a country where, when you are picked up by the police, you may be tortured, you may disappear, you may be subjected to tremendous humiliation; and with that firmly in their minds, offer them the opportunity to live.

## IV

## WHEN POLICE HAVE GIVEN A LIFE AND DEATH INCENTIVE TO AN INCARCERATED WITNESS TO MAKE THE IDENTIFICATION THE POLICE WANT, A "DISASTEROUSLY SUGGESTIVE" PHOTO DISPLAY WHICH FOLLOWS ON THE HEELS OF THAT INCENTIVE CANNOT SURVIVE CONSTITUTIONAL MUSTER.

### A. The Suggestive Procedures

The actions of the government created unreliable evidence by needlessly stripping the whole process of all indicia of reliability. As discussed in III, from the outset, INS agents poisoned the process by giving the refugee witness an incredible incentive to fabricate. The agents told the refugee that if he "gave them answers they liked they would let (him) and the children go to Washington." Otherwise, the refugees would be deported to what he testified to be death in El Salvador.

After creating this powerful motivation to fabricate, the INS agents made certain that the male refugee knew who he was supposed to pick.

The agents had been told that an anglo blonde woman assisted the refugees; they set out to assure that Stacey Lynn Merkt would be

identified as that person.

Incredibly, the agents took a color photo display of seven hispanic women and, with the refugee witness seated between them, discussed adding Stacey Lynn Merkt's picture. One of the agents left the room, returned with a black and white photo of Ms. Merkt, and while the witness sat there next to him, put Ms. Merkt's picture at the end of the display of hispanic women. This naturally made Ms. Merkt the only white woman and the only light haired woman in the display. More importantly, it made her the only woman who was specifically discussed and added to the display right before the witness's eyes.

The photo display of Mr. Elder was likewise constructed right in front of the witness after the agents discussed adding his picture. Mr. Elder was displayed with other white males, but was the only one with a mustache and glasses.

Thus, the government created a powerful reason for the witness to fabricate and then made it crystal clear who they wanted identified. This case stepped beyond suggestive procedures,

which indicate who the agents believe is responsible for the crime; it also created an incentive or bribe (here, life itself) to assure the witness followed the suggestion. This government-created combination was so corrosive to the witness's reliability as to render it non-existent.

B. Reliability

No other evidence supported the male refugee's identification. In fact, it was directly proven to be false. The female refugee did not identify either Mr. Elder or Ms. Merkt. This is particularly revealing in that she was not present, as the male refugee was, when the agents constructed the display, and thus, had not heard who it was she was supposed to identify. Likewise, she had not been present when promises regarding staying in the country were made.

The bus station ticket sales person testified that she remembered well who bought the refugees bus tickets and indeed a blonde anglo had bought the bus tickets for the

refugees, but the purchaser was not Ms. Merkt, but rather was approximately 50 years old and taught at Pan American University.

Most importantly, it was shown that at the time the male refugee claimed Ms. Merkt had bought his ticket and then driven him to the bus station, Ms. Merkt was not within 1,500 miles of South Texas. The refugee claimed that the first time he talked to the woman who helped him about helping him was two or three days before his arrest. He claimed, on the day of his arrest, that he was driven to the bus station by Ms. Merkt. This was her supposed involvement in the case, and it was shown to be untrue. Almost a dozen witnesses established that for more than a week before and several days after the refugee's arrest, Ms. Merkt was not even in the State of Texas. Representatives of the airlines confirmed that tickets had been bought and used going to and returning from New York in her name, placing her in New York City during this time period. Pictures and witnesses established that she was in fact in New York attending a

wedding and then a Thanksgiving celebration during this time period. Her probation officer confirmed she had received permission to go to New York prior to her trip and checked in upon her return. She had left Texas long before the refugee claimed he first approached her about helping him get to the bus station. The jury clearly accepted this as true in that they acquitted Ms. Merkt of the charges of transporting the refugees to the bus station. Thus, we can see, not only did the procedures create a substantial likelihood of misidentification, but they in fact, did result in a false identification.

C. The Fifth Circuit Panel Decision

In examining the constitutionality of admitting this identification evidence, the Fifth Circuit panel decision ignores the impact on reliability of an identification procedure which is preceded by a life or death bribe for giving "the answer they liked." In such a situation, the only way the identification can survive constitutional challenge is if indicia

of reliability exist which are not the direct product of the corrupting process. Here such was not the case. The "disasterously" suggestive procedures blatantly indicated who the compromised witness should pick.

In its analysis of the five factor test set out in Manson v Brathwaite, 432 U.S. 98 (1977), the decision impermissibly uses the tainted identification to substantiate itself. The opinion does not look for substantiation or indicia of reliability from outside the witness's own rebuffed claims. The decision's discussion is based primarily on the discredited claim that Ms. Merkt was in Texas on November 21, 1984 which the evidence established was not true.

Manson v Brathwaite, supra and United States v Cueto, 611 F.2d 1056 (5 Cir 1980) explains that one must look to the totality of the circumstances to determine if an identification procedure led to a substantial likelihood of misidentification. Here, all indicators, other than the doubly tainted

identification itself, show it to be unreliable.

Thus, the Fifth Circuit's decision carves out a new rule of admissibility that holds that even if the identification procedures are impermissibly suggestive, and even if there are no independent indicators of reliability, and even where substantial incentive is given to make an identification consistent with the agent's theory of who should be identified, it is still admissible. Such a rule encourages law enforcement agents to destroy reliability and grievously damages the truth finding process by tightly leading the witness to the desired result.

If a non-suggestive line-up had been used after the improper incentives to lie had been implanted, the line-up procedures themselves might have provided indicators of reliability. But instead, the agents conducted a "disasterously suggestive" photo display, destroying any way to know whether the identification was the product of honest memory or induced by the bribe.

It is just this sort of evidence tampering that the rules of evidence and exclusionary rules are designed to prohibit. There was no reason consistent with finding the truth to use such a procedure. The only reason for such a procedure was to make sure two pre-selected people were identified, whether correctly or not.

The due process clause, the confrontation clause, as well as other constitutional concepts exist to prevent this sort of abuse. The Fifth Circuit's opinion cannot stand consistent with even the most subdued concepts of due process. If it is allowed to stand, it will tarnish the investigative process and needlessly lead to a pronounced reduction in the trustworthiness of the trial process.

## CONCLUSION

The case before the Court raises several disturbing issues for your review. First, the Fifth Circuit's dramatic abandonment of the "strict scrutiny" balancing test when government seeks to intrude upon and criminalize religious behavior, requires the attention of this Court. The decision of the Fifth Circuit totally restructures the relationship between governmental power and religious freedom. Such a dramatic shift in a constitutional law cannot appropriately be wrought by a Federal Circuit Court but must be reviewed and considered by this Court. The change the Fifth Circuit has embraced is counter-productive to the very foundation of our nation's adherence to governmental restraint in areas of religious belief and constitutional limitations on the power of government to intrude in these areas.

The case also gives rise to the need to assure that the concepts of due process and fair trial are not swept aside in cases where people, who are perhaps viewed as unpopular in the eyes

of some, are tried in a slipshod manner using government-created unreliable evidence which was shown to not only be unreliable, but in fact, false. The use of corrupting inducements and "disasterously" suggestive identification techniques, stripped of all indices of reliability, cannot be sanctioned by our courts.

In a case that is being watched by so many good solid citizens, it is important that the message is not sent that in an American Court, convictions can be obtained in such a manner.

Respectfully submitted,

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86-1086

Supreme Court, U.S.
FILED
DEC 2 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

# Supreme Court of the United States

OCTOBER 1986 TERM

STACEY LYNN MERKT and
JOHN B. ELDER,

*Petitioners,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

## APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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VI. Extension to December 3, 1986 to file Petition for Certiorari granted by the Honorable Justice Byron White.

I

Order of the Honorable Judge Vela, Trial Judge, adopting the Opinion of the Honorable Judge Head as controlling on Petitioner's Motions to Dismiss, particularly, First Amendment - Religion.

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
F I L E D
FEB 22, 1985
JESSE E. CLARK, CLERK
BY DEPUTY

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

BROWNSVILLE DIVISION

| | | |
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| UNITED STATES OF AMERICA | § | |
| VS. | § | CR. NO. B-84-746 |
| STACEY LYNN MERKT<br>JOHN B. ELDER | § | |

O R D E R

Defendants have filed several pre-trial motions in the above entitled and numbered cause which raise identical legal issues presented in United States of America v. John B. Elder, Cr. No. B-84-276.

Therefore, it is ORDERED that the attached Opinion on Motions to Dismiss and the evidence adduced at the hearings therein be and the same is hereby adopted for all purposes and made a part of this record. The Defendants preserve their exception.

The Clerk shall send a copy of this Order to all counsel.

DONE at Brownsville, Texas this 22 day of February, 1985.

FILEMON B. VELA
United States District Judge

## II

## Opinion of the Honorable Judge Head regarding Motions to Dismiss First Amendment - Religion.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | § | |
| V. | § | CR. NO. B-84-276 |
| JOHN B. ELDER | § | |

# OPINION ON MOTIONS TO DISMISS

## I. INTRODUCTION

The United States accused the Defendant John B. Elder of unlawfully transporting three undocumented Salvadoran aliens in violation of 8 U.S.C. § 1324(a)(2). Elder filed various motions to dismiss, including motions based on freedom of religion, domestic and international refugee law, selective prosecution, and estoppel. He also filed a motion to suppress based on an allegedly improper showup. After extensive pretrial evidentiary hearings, the Court, in open court, denied all motions to dismiss and the motion to suppress. This opinion discusses only those motions which the Court feels are sufficiently unique to merit a written opinion.

II. FACTS

Elder is the director of the Casa Oscar Romero (Casa Romero), named in honor of the assassinated Roman Catholic Archbishop of El Salvador. Casa Romero, located in San Benito, Cameron County, Texas, provides assistance and shelter to Central Americans, principally Salvadorans, who have fled Central America and entered the United States. Elder considers these persons "refugees" under the Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 102, and international law. Elder regards Casa Romero as a sanctuary in the biblical sense. The testimony indicated that the Casa Romero was founded in December, 1982, on land donated by the Roman Catholic Diocese of Brownsville. Parishes and congregations of various religious affiliations donated seed money and continue to provide financial support for the Casa Romero. The Roman Catholic Diocese of Brownsville plays a financial and leadership role in the operation of the Casa Romero.

On March 12, 1984, Elder transported three undocumented Salvadorans six miles from the Casa Romero to a bus station in Harlingen,

Texas, within the Rio Grande Valley. Without permission or documentation, these aliens together had entered the United States earlier that same day in the vicinity of the Matamoros-Brownsville International Bridge. The Salvadorans then walked twenty-five miles to San Benito, where they were directed to the Casa Romero. After they ate and rested at the Casa Romero, the Salvadorans asked Elder for a ride to the Harligen bus station. The Salvadorans planned to go north to Houston on the bus through the Border Patrol checkpoint located north of Harlingen on U.S. Highway 77. Elder complied with the Salvadorans' request by taking them to the Continental Trailways Bus Station in Harlingen. Elder knew of the Salvadorans' plan to go to Houston.

Two Border Patrol agents saw the three Salvadorans get out of Elder's vehicle in front of the bus station. After the agents recorded the license plate number of the vehicle the agents detained the Salvadorans and took them to the Harlingen Border Patrol office. A license plate check revealed that the car was registered to Elder. An agent of the Immigration

and Naturalization Service (INS) later returned the Salvadorans to the Casa Romero, where the Salvadorans identified Elder. At the pretrial evidentiary hearing, the Salvadorans and the Border Patrol agents identified Elder as the driver of the vehicle.

III. MOTION TO DISMISS - FREEDOM OF RELIGION

Elder contends that his First Amendment right to exercise religion entitles him to put into practice his religious beliefs, which includes providing shelter and transportation for Salvadoran aliens, even if those practices clash with the statutory prohibitions of 8 U.S.C. § 1324(a)(2). Courts have recognized that the exercise of religious freedom can sometimes excuse criminal conduct, see Wisconsin v. Yoder, 406 U.S. 205, 92 S. Ct. 1526 (1972); People v. Woody, 61 Cal.2d 716, 40 Cal. Rptr. 69, 394 P.2d 813 (1964); however, the Supreme Court has determined that the enforcement of criminal laws can be constitutionally achieved even if the laws interfere with the religious practices of individuals. See Cantwell v.

Connecticut, 310 U.S. 296, 60 S. Ct. 900 (1940); Prince v. Commonwealth of Massachusetts, 321 U.S. 158, 64 S. Ct. 438 (1944); Reynolds v. United States, 98 U.S. 145 (1878). The First Amendment "embraces two concepts--freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be." Cantwell v. Connecticut, 310 U.S. at 303-04, 60 S. Ct. at 903.

Recent court decisions describe the appropriate analysis to resolve the conflict between the prohibitions of a criminal statute and the perceived mandates of religious practice. Elder bears the initial burden to demonstrate that religious beliefs motivated his conduct. The burden then shifts to the Government to justify placing limitations on the religious conduct. The Government must show that such limitations are essential to accomplish a compelling governmental interest. The limitation on religion must not exceed the least burdensome method of accomplishing the Government's purpose without infringing First Amendment rights.

Peyote Way Church of God, Inc. v. Smith. 742 F.2d 193, 200 (5th Cir. 1984); see United States v. Lee, 455 U.S. 252, 102 S. Ct. 1051 (1982); Wisconsin v. Yoder, 406 U.S. 205, 92 S. Ct. 1526 (1972).

When a defendant presents evidence to meet his initial burden, the Court must be careful and deferential in examining the Defendant's beliefs. The Supreme Court notes that the determination of what constitutes a religious belief or practice presents "a most delicate question." Wisconsin v. Yoder, 406 U.S. at 215, 92 S. Ct. at 1533. The Court should neither interpret canon law nor define the parameters of a religion. See Thomas v. Review Board of the Indiana Employment Security Division, 450 U.S. 707, 715-16, 101 S. Ct. 1425, 1430-31 (1981).

The Court finds that Elder has met his initial burden. He is a Roman Catholic who feels a charitable Christian commitment, founded in the Gospel, which motivates him to assist those who flee the violence in El Salvador. Elder presented the testimony of various Christian

clergymen who confirmed that assistance to those in need remains a fundamental aspect of Christianity. Bishop John Fitzpatrick, Bishop of the Roman Catholic Diocese of Brownsville, testified that meeting material human needs represents an essential aspect of Christianity, and that each individual remains free to fulfill this obligation according to the directives of his or her own conscience. Although no law of the Roman Catholic Church specifically requires Roman Catholics to provide sanctuary or rides to Salvadorans, Bishop Fitzpatrick believes that providing such assistance constitutes an appropriate expression of the Christian gospel. According to the testimony of the various ministers, this conclusion also holds true in other denominations. These ministers included Donovan Cook of the American Baptist Church, James Andrews of the Presbyterian Church, John Steinbrook of the Lutheran Church, and Gilbert Dawes and John Soper of the United Methodist Church. The Government called no witnesses to oppose the testimony of these ministers.

Elder feels a religious commitment to assist Salvadorans because of the political turbulence in that country. An insurgent movement currently exists in El Salvador which continues to battle government forces. Elder filed numerous statements from alleged eyewitnesses who describe a brutal situation in El Salvador. According to these statements and testimony in court, the conflict in El Salvador has resulted in much violence and many atrocities directed at the civilian population from both sides. The testimony contains graphic descriptions of torture, murder, brutalities, and disappearances. The violence has included church workers among its victims.

Although the Court has no reasons to doubt the description of tragedy and horror in El Salvador, the Court need only find that Elder believed that such violence actually occurred. This Court has no responsibility to make factual findings concerning the situation in El Salvador. The Court need not make any foreign policy judgments in order to conclude that, in assisting the Salvadorans, Elder acted in accordance with his personal view of Christianity. The Bishop of

the Brownsville Diocese believes that Elder is a religious man who practiced his Roman Catholicism when he transported the Salvadorans. According to the Bishop, as a practicing Roman Catholic, the expression of Elder's inner religious thoughts can properly be evidenced by charitable social action, such as assistance to undocumented Central Americans.

The Court understands that other members of the Roman Catholic faith may oppose Elder's activist response to the situation in Central American. The Court emphasizes that it is not an arbiter of canon law. The Court simply finds that Elder fulfilled his Christian obligations as he genuinely perceived them to be and that Elder presented substantial testimony to support his view of Christianity. This Court's conclusions are not intended to define the Christian gospel or Christian response to it. The Court need not correctly interpret Christian doctrine in order to hear the position of the Defendant.

Because Elder meets his initial burden, the Government must show an overriding interest to justify prosecution. The Court finds that

the Government meets its burden to demonstrate an overriding interest in protecting a congressionally-sanctioned immigration and naturalization system designed to maintain the integrity of this Nation's borders. In discussing the importance of United States' immigration laws, the Supreme Court has repeatedly emphasized the importance which sovereign nations place upon controlling entry through their borders. In Kleindienst v. Mandel, 408 U.S. 753, 765, 92 S. Ct. 2576, 2583 (1972), the Supreme Court agreed that controls over immigration are "inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers--a power to be exercised exclusively by the political branches of government ..." In Fiallo v. Bell, 430 U.S. 787, 792, 97 S. Ct. 1473, 1478 (1977), [quoting Oceanic Navigation Co. v. Stranahan, 214 U.S. 320, 339, 29 S. Ct. 671, 676 (1909)], the Supreme Court underscored the limited role of the judiciary with respect to immigration and reemphasized that "'over no conceivable subject is the legislative power of Congress more complete

than it is over' the admission of aliens."

The ability to control entry and to identify those admitted remains vital to the welfare and security of the people. See The Japanese Immigrant Case, 189 U.S. 86, 96-97, 23 S. Ct. 611, 613 (1903); Boutilier v. Immigration and Naturalization Service, 387 U.S. 118, 123-24, 87 S. Ct. 1563, 1567 (1967). Circumvention by individuals of the congressionally-prescribed procedure for entry, even if religiously motivated, undermines the historically legitimate goals of immigration control. Protection of the borders represents a national obligation fulfilled by the Government for the benefit of all Americans. See The Chinese Exclusion Case, 130 U.S. 581, 603-07, 9 S. Ct. 623, 629-30 (1889). Elder's do-it-yourself immigration policy, while charitable, gives away what is not his to give away--the Government's legitimate right to examine every person who enters the country so that the Government can make informed decisions on who will be admitted.

The United States retains interests in immigration control for security reasons. Richard Casillas, District Director for the INS

in San Antonio, Texas, explained that potential immigrants must submit a biographical data sheet for review by law enforcement agencies. The goal of this system of immigration control is to prevent entry by enemies of the state, criminals, and other classifications of immigrants which Congress determines to be undesirable. Without a functional system, the country remains unable to inquire and therefore powerless to control. The INS also faces problems with counterfeit identification and documentation obtained by aliens who wish to assimilate into American society. Casillas testified that the INS recently redirected its limited resources to deal with the growing problem of undocumented aliens who make fraudulent applications to receive benefits under entitlement programs.

The parties presented conflicting evidence concerning the beneficial or harmful impact exerted by undocumented workers upon the labor market and the national economy. David North, an immigration researcher who testified for the Government, concluded that undocumented aliens drained social resources, depressed wages, displaced minority and women workers, and impeded

technological development in some sectors of the economy. Thomas Muller, an expert for the defense, found that undocumented immigrants filled unwanted jobs and helped to create new jobs and prosperity. Another defense expert, Gilberto Cardenas, testified that undocumented aliens adversely affected local funds for social services, but that the State of Texas as a whole received a net benefit from contributions paid by undocumented aliens into the state's social programs. This existing controversy among experts proves, first, that the economic impact of illegal immigration remains unresolved and, second, that the Court should not resolve the dispute. As long as the issue persists, Congress remains entitled to examine the immigration question and to pass legislation to address the problems which Congress discovers. Congress may direct the executive to account for each individual who enters the country and to make appropriate decisions in the best interest of all Americans.

The Court must also analyze whether

the Government utilizes the least burdensome method to accomplish its purpose in securing the Nation's borders. The Court finds that the Government must retain the sole authority to determine who may cross the borders or travel further within the country. If the Government attempted to accommodate into its immigration policy Elder's religious beliefs, the Government's efforts would result in no immigration policy at all. As testimony from Defendant's witnesses indicated, the moral obligation to assist others crosses religious and denominational lines. These widely-held beliefs allow adherents to exercise considerable discretion and would permit religious individuals to form personal immigration policies. See United States v. Lee, 455 U.S. at 259-60, 102 S. Ct. at 1056-57. Elder wishes to limit this Court's view solely to the violence in El Salvador; however, the human condition remains miserable in many parts of the globe. Man's inhumanity to man, as well as nature's, has been unrelenting throughout history. Many people live on this planet who logically are no less worthy of Elder's

Christian charity than the Salvadorans. The consciences of others religiously motivated may conclude that the starving and impoverished of North Africa, Asia, or Mexico are equally entitled to enter this country without review by the INS.

Obviously all cannot enter. Congress has recognized in its immigration policy that the United States cannot absorb all who wish to enter this country to take advantage of its relative tranquility and bounty. Congress has therefore established appropriate standards and procedures by which to determine proper entry. The Government, as the representative of all Americans, must retain the sole authority and responsibility to make these hard decisions and has put a system into place which individuals, without regard to their motivations, cannot be allowed to evade. See The Chinese Exclusion Case, 130 U.S. at 603-09, 9 S. Ct. at 629-31.

The United States accepts applications for asylum from all nationalities, including Salvadorans, under a procedure which takes into account the social and political conditions

which exist in their homelands. See generally Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 102. Title 8 U.S.C. § 1158(a) authorizes the Attorney General to establish a procedure for asylum, see 8 C.F.R. §§ 208.1-208.16 (1984), which provides protection to applicants who fall under the statutory definition of refugee. Title 8 U.S.C. § 1101(a)(42)(A) includes as refugees those persons unable or unwilling to return to their native countries "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion ..." A potential refugee may enter the country and apply for asylum with the local District Director of the INS. See 8 C.F.R. § 208.3(a). All potential refugees also receive the opportunity to submit applications for asylum during exclusion or deportation proceedings before an immigration judge. See C.F.R. §§ 208.3(a), 208.9. Those denied asylum by an immigration judge may appeal the decision within the INS. The testimony indicates that some Salvadorans have petitioned for and

received asylum. Petitioners who are denied asylum have recourse to all levels of the federal courts for review of the decision, see Ramirez-Osorio v. Immigration and Naturalization Service, 745 F.2d 937, 946 n. 15 (5th Cir. 1984), including the United States Supreme Court. See Immigration and Naturalization Service v. Stevic, ___ U.S. ___, 104 S. Ct. 2489 (1984).

This Court finds that implementation of the immigration laws represents an important Government interest which, on balance, justifies enforcement of § 1324(a)(2) against Elder. The Court also finds that the Government utilizes the least burdensome method by which to accomplish its goals, especially since nothing in this decision prohibits the exercise of Christian charity to those who present themselves before the INS to apply for asylum and who proceed under INS rules. See United States v. Pereira-Pineda, 721 F.2d 137 (5th Cir. 1983). The Court accordingly denies the motion to dismiss based on free exercise of religion.

## IV. MOTIONS TO DISMISS UNDER DOMESTIC AND INTERNATIONAL LAW

Elder introduces various motions to dismiss based on domestic and international refugee law. Elder's motions based on domestic law essentially argue that 8 U.S.C. § 1253(h) entitled the Salvadoran aliens that he transported to remain in the United States because they fall under the definition of refugee. Section 1253(h), as amended by the Refugee Act of 1980, provides that the Attorney General "shall not deport or return any alien... to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion." Elder asserts that because the Salvadorans he transported qualified for protection as refugees, the Government cannot prove that the aliens were present unlawfully, an essential element of § 1324(a)(2). See United States v. Shaddix, 693 F.2d 1135, 1137-38 (5th Cir. 1982). The Defendant argues that his assistance to the Salvadorans remained perfectly legal, and he

requests dismissal of the indictment.

The Court refuses the invitation to circumvent the statutory scheme and declines to dismiss the indictment. Fifth Circuit law clearly holds that before Salvadoran aliens may reside legally within this country they must submit applications for asylum with the Government. United States v. Pereira-Pineda, 721 F.2d 137 (5th Cir. 1983); see Martinez-Romero v. Immigration and Naturalization Service, 692 F.2d 595, 595-96 (9th Cir. 1982). The Defendant essentially asks the Court to make a finding of fact concerning the refugee status of the Salvadorans. Title 8 U.S.C. § 1158 and § 1253(h), however, authorize the Attorney General to determine the refugee status of an individual. The statutes do not permit either the Court or the Defendant to determine the refugee status of the Salvadorans nor can the Court submit such an issue to a jury. Under the statutory scheme, the decision lies exclusively with the Attorney General, subject to appropriate avenues of judicial review. See Ramirez-Osorio v. Immigration and Naturalization Service,

745 F.2d 937, 946 n. 15 (5th Cir. 1984).

The Defendant also argues that international laws and treaties automatically entitle the aliens to receive refugee status without regard to our own national laws. The Court concludes that Congress intended the Refugee Act of 1980 to fulfill its obligations under international law, see Immigration and Naturalization Service v. Stevic, ___ U.S. ___, 104 S. Ct. 2489 (1984), and this Act designates the Attorney General to determine refugee status. Congress also indicated that the Government should review applications from Salvadorans on a case-by-case basis. See Pub.L. 97-113, § 731, 95 Stat. 1519. The Court cannot interfere with political decisions which the United States as a sovereign nation chooses to make in the interpretation, enforcement, or rejection of treaty commitments which affect immigration. See The Chinese Exclusion Case, 130 U.S. 581, 9 S. Ct. 623 (1889); Botiller v. Dominguez, 130 U.S. 238, 247, 9 S. Ct. 525, 527 (1889); Fiallo v. Bell, 430 U.S. 787, 792, 97 S. Ct. 1473, 1478 (1977); 74 Am. Jur. 2d Treaties §§ 14, 36 (1974). The Court

accordingly denies Defendant's motions to dismiss under domestic and international refugee law.

ORDERED this 13th day of February, 1985.

HAYDEN W. HEAD, JR.
UNITED STATES DISTRICT JUDGE

# III

## Opinion of the Panel of the United States Court of Appeals for the Fifth Circuit.

# UNITED STATES COURT OF APPEALS
# FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*

v.

STACEY LYNN MERKT and JOHN B. ELDER,
*Defendants-Appellants.*

No. 85-2264

OPINION

Filed July 17, 1986

Before: Jerre S. Williams, Will Garwood, and Edith H. Jones, Circuit Judges.

Opinion by Judge Edith H. Jones

Appeal from the United States District Court
for the Southern District of Texas
Filemon B. Vela, District Judge, Presiding

## SUMMARY

**Immigration and Naturalization/Criminal Law**

Appeal from judgments of conviction. Affirmed.

Defendants were convicted of conspiracy in connection with the smuggling of illegal aliens. The charges arose from the arrest of an El Salvadorian man and woman who had entered the country illegally. They told U.S. Border Patrol agents that one of the defendants had met them at the border and driven them to a sanctuary where they stayed for approximately fifteen days. At the sanctuary, they sometimes saw that defendant and also met the other defendant who was a volunteer there.

[1] The free exercise clause of the first amendment embraces two concepts, freedom to believe and freedom to act. The first is abso-

lute but the second is not. Legislation, religiously neutral on its face, may regulate the health, safety, and general welfare of the public, or certain activities within the purview of the federal government, even if individuals will thereby be penalized because the practice of their religious doctrine violates the law. [2] The strong interest of the government in controlling its own borders is alone sufficient reason to deny defendants' claims of immunity from prosecution under the free exercise clause of the first amendment. [3] The Supreme Court has, at times, applied a balancing test to free exercise claims. The test requires examining the extent of the burden posed on a defendants' religious practice, the interest of the government in uniform law enforcement, and the likelihood that the government could enforce its policy by other, less intrusive means. It is unclear what situations require the use of this test and, therefore, exhibiting caution, this court will complete the analysis. [4] Here, it is unclear how the criminal offense unduly burdens defendants' free exercise of religion. There was no evidence presented at the pre trial hearing or at the trial that suggested that devout Christian belief mandates participation in the sanctuary movement. [5] Contrary to defendants' arguments, the state does have a compelling interest in the uniform enforcement of border control laws. The interest in uniform application of a facially neutral criminal law is acute. The compelling state interest, moreover, becomes more compelling in proportion to the increasing magnitude of the violations. [6] Defendants' proffered less restrictive alternatives, by their very triviality, highlight the necessity for criminal sanctions. A further objection to requiring the government to adopt less restrictive alternatives that would protect defendants' religious practices is the open-endedness of their demand.

[7] Evidence of a pretrial identification will be inadmissible only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. The district court was not clearly erroneous in its determination that the male photographic array was unnecessarily suggestive. [8] The government concedes that the female photographic array was impermissibly suggestive. The court must determine, therefore, whether under the totality of the circumstances, the suggestiveness led to a substantial likelihood of irreparable misidentification. A review of a number of factors indicates a reliable basis for the identification. [9] A motion for recusal is com-

mitted to the sound discretion of the trial judge and will not be reversed on appeal unless the judge has abused his discretion. The alleged bias or prejudice must be personal and it must stem from an extrajudicial source which would result in an opinion on the merits on some basis other than what the judge learned from his participation in the case. Here, defendants have not shown, by affidavit or otherwise, that the judge's impartiality might reasonably be questioned or that he had a personal bias or prejudice against either defendant.

[10] The admission at trial of a coerced out of court statement from a non defendant may violate the defendant's right to a fair trial as guaranteed by the due process clause of the fifth amendment. The voluntariness of the statement of a witness is generally determined in a pretrial suppression hearing. [11] Here, the facts presented at trial did not warrant an evidentiary hearing on the issue of voluntariness. [12] Evidence of other crimes is not admissible to prove character of a person in order to show that she acted in conformity therewith. A trial court's decision to admit extrinsic offense evidence will be rejected only for an abuse of discretion. Extrinsic offense evidence is particularly probative in a conspiracy case to show intent or knowledge. Only when a defendant affirmatively takes the issue of intent out of the case is he entitled to an exclusion of the evidence. [13] The court must make an on the record determination that the probative value outweighs the prejudicial effect before admitting extrinsic offense evidence. The requirement of a prior on the record articulation is only triggered by the request of the party.

[14] It is unlawful for a person to assist an alien who is not lawfully entitled to enter or reside within the United States. Since the aliens' status is an element of the crime charged, the defendants assert that whether the aliens are refugees entitled to remain in the United States is a question of fact which should have been submitted to the jury. Even if the aliens are refugees under the United Nations Protocol Relating to the Status of Refugees, they are not permitted to reside here contrary to domestic law. [15] The government must prove that the defendants acted wilfully in furtherance of the aliens' violation of the law. Mere or incidental transportation of an alien is not sufficient to sustain a conviction. The court's instruction to the jury substantially covered that requested by

defendants and, in substance, embodied the above principles. [16] Having reviewed all the evidence in the light most favorable to the government, the court concludes that it was sufficient to sustain the convictions.

## OPINION

EDITH H. JONES, Circuit Judge:

In August 1984, Jose Andres Mendez-Valle and Maria Calletano Rosales-Cruz, El Salvadoran citizens, along with three El Salvadoran juveniles (hereinafter collectively referred to as "illegal aliens" or "aliens") left El Salvador.[1] Having reached Saltillo, Mexico, by bus, Mendez-Valle contacted relatives in Washington, D.C., who instructed him to remain in Mexico until further notice. Several weeks later, two American women came and took the aliens to a church in Matamoros, Mexico, near the Rio Grande River. The aliens spent the night at the church and, the following morning, a man escorted them to the river and directed them to cross at a point where the appellant, John B. Elder, was waiting on the other side.

Once in the United States, Elder drove the illegal aliens to the self-styled sanctuary, Casa Oscar Romero, in San Benito, Texas, where they remained for approximately fifteen days. While at Casa Oscar Romero, Mendez-Valle occasionally saw Elder, who directed the house, and also became acquainted with the appellant, Stacey Lynn Merkt, a volunteer there, when Mendez-Valle gave her money to buy the aliens bus tickets to Houston.

In the early morning hours of November 21, Mendez-Valle was given five bus tickets. Merkt drove the aliens to the bus station in McAllen, Texas, where they were directed to the proper bus. En route to Houston, the bus stopped in Weslaco. There, U.S. Border Patrol agents boarded the bus to check for illegal aliens. Mendez-Valle, Rosales-Cruz, and the three juveniles were arrested, given *Miranda* warnings, and taken to the Border Patrol station in Mer-

[1]We recite the facts, as we must, in the light most favorable to the government and the jury's verdict. *See United States v. Alvarado Garcia*, 781 F.2d 422, 423 & n.1 (5th Cir. 1986).

cedes, Texas. There, the agents learned that the aliens might have been smuggled into the United States. Accordingly, after initial processing, the aliens were sent to the Anti-Smuggling Unit in McAllen.

At the Border Patrol station in McAllen, Mendez-Valle generally described and later indentified both Elder and Merkt. Rosales-Cruz was not able to identify either defendant from a photographic line-up.

Elder was indicted, charged, and convicted of two counts of conspiracy, two counts of bringing in and landing illegal aliens, in violation of 8 U.S.C. § 1324(a)(1), and two counts of transporting illegal aliens, in violation of 8 U.S.C. § 1324(a)(2).[2] Merkt, indicted on one conspiracy count and two substantive transportation counts, was found guilty only of the conspiracy count. The appellants challenge their convictions on numerous grounds which we, after careful consideration, reject.

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[2]Section 1324(a) sets forth the conditions under which persons can be found liable for bringing in and harboring illegal aliens:

> Any person, including the owner, operator, pilot, master, commanding officer, agent, or consignee of any means of transportation who—
>
> (1) brings into or lands in the United States, by any means of transportation or otherwise, or attempts, by himself or through another, to bring into or land in the United States, by any means of transportation or otherwise; [or]
>
> (2) knowing that he is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior thereto, transports, or moves, or attempts to transport or move, within the United States by means of transportation or otherwise, in furtherance of such violation of law.
>
> • • • •
>
> any alien . . . not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this chapter or any other law relating to the immigration or expulsion of aliens shall be guilty of a felony . . . .

8 U.S.C. § 1324(a)(1), (2).

I.

FREE EXERCISE CLAIM

Appellants contend that their convictions are barred by their religiously motivated "sanctuary" activities for El Salvadorans, which give rise to first amendment immunity from punishment for violating 8 U.S.C. § 1324.

American society extols its tradition as a haven for those to whom obligations or piety and conscience rank higher than the goods of this world. The tradition, at one level, was embodied in the "free exercise" clause of the Bill of Rights. While respecting the rights of citizens to adhere to different religions, however, it has never been doubted that the government's duty to all may, in some circumstances, encroach upon the practices of a few. Appellants Merkt and Elder seek sanctuary in the "free exercise" clause against their violation of national border control laws. This court, whose sanctuary power is rigidly controlled by precedent, cannot grant their request.

[1] The Supreme Court in *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940), noted that the free exercise clause

> embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.

*Id.* at 303-04, 60 S.Ct. at 903, 84 L.Ed. at 1218 (footnote omitted). Following the dichotomy, a significant body of Supreme Court law has explained that legislation, religiously neutral on its face, may regulate the health, safety, and general welfare of the public, or certain activities within the purview of the federal government, even if individuals will thereby be penalized because the practice of their religious doctrine violates the law. *See Sherbert v. Verner*, 374 U.S.

398, 403, 83 S.Ct. 1790, 1793, 10 L.Ed.2d 965, 970 (1963). *See, e.g., Braunfeld v. Brown*, 366 U.S. 599, 81 S.Ct. 1144, 6 L.Ed.2d 563 (1961) (Sunday closing laws); *Prince v. Massachusetts*, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944) (child labor laws); *Davis v. Beason*, 133 U.S. 333, 10 S.Ct. 299, 33 L.Ed. 637 (1890) (voter registration laws); *Reynolds v. United States*, 98 U.S. 145, 25 L.Ed. 244 (1878) (polygamy laws). In *Gillette v. United States*, 401 U.S. 437, 91 S.Ct. 828, 28 L.Ed.2d 168 (1971), the Supreme Court found unconvincing a "free exercise" claim to exemption from compulsory military service by petitioners who conscientiously objected only to the Vietnam war. The government held an overriding interest in raising armies, and the exemption was theologically neutral. *Id.* at 462, 91 S.Ct. at 842-43, 28 L.Ed.2d at 188. In *Goldman v. Weinberger*, ___ U.S. ___, 106 S.Ct. 1310, 1314, 89 L.Ed.2d 478, 485 (1986), the Court, relying on the special needs of the armed forces for uniformity and discipline, upheld a religiously neutral Air Force regulation the effect of which was to forbid an orthodox Jewish serviceman to wear a yarmulke.

The lower federal courts have consistently refused to create free exercise havens from violation of the national criminal laws against use and sale of marijuana. *See United States v. Rush*, 738 F.2d 497, 511-13 (1st Cir. 1984), *cert. denied*, ___ U.S. ___, 105 S.Ct. 1355, 84 L.Ed.2d 378 (1985); *United States v. Middleton*, 690 F.2d 820, 824-26 (11th Cir. 1982), *cert. denied*, 460 U.S. 1051, 103 S.Ct. 1497, 75 L.Ed.2d 929 (1983); *Leary v. United States*, 383 F.2d 851, 859-61 (5th Cir. 1967), *rev'd in part and remanded on other grounds*, 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969). Likewise, criminal laws prohibiting destruction of government property, *United States v. Allen*, 760 F.2d 447, 453 (2d Cir. 1985), extortion, *United States v. Starks*, 515 F.2d 112, 124 (3d Cir. 1975), *aff'd in relevant part sub nom. Abney v. United States*, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977), racketeering, *United States v. Dickens*, 695 F.2d 765, 772-73 (3d Cir. 1982), *cert. denied*, 460 U.S. 1092, 103 S.Ct. 1792, 76 L.Ed.2d 359 (1983), and refusal to testify before a grand jury, *Smilow v. United States*, 465 F.2d 802, 804-05 (2d Cir.), *vacated and remanded on other grounds*, 409 U.S. 944, 93 S.Ct. 268, 34 L.Ed.2d 215 (1972), have been enforced against pleas for preferment based on "free exercise". The basis for these decisions was the conclusion that "the very concept of ordered liberty precludes allowing every person to make his own standards on mat-

ters of conduct in which society as a whole has important interests." *Wisconsin v. Yoder*, 406 U.S. 205, 215-16, 92 S.Ct. 1526, 1533, 32 L.Ed.2d 15, 25 (1972).

[2] Enforcement of 8 U.S.C. § 1324 cannot, consistent with this authority, brook exceptions for those who claim to obey a higher authority. The prohibition on the landing and transport of illegal aliens represents but one facet of the comprehensive legal framework governing entry into the United States and admission to its citizenship. The importance of the prohibition is reflected in the criminalization of conduct, as opposed to milder enforcement sanctions. Control of one's borders and of the identity of one's citizens is an essential feature of national sovereignty.[3] Relinquish this control and it may fairly be said that there remains no territorial or social body which can be called a sovereign nation. The peace, order, and very existence of society are bound up in its border control laws as much as in its criminal and conscription laws. Although their scope and application may be justly criticized, there can be no doubt that, until Congress changes the border control laws, they must be uniformly obeyed. On this basis alone, the first amendment challenge of Merkt and Elder to their convictions fails.

[3] The appellants urge us to apply the analysis of *Wisconsin v. Yoder* and *United States v. Lee*, 455 U.S. 252, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982) to their case, which would require examining the extent of the burden imposed on their religious practices, the interest of the government in uniform law enforcement, and the likelihood that the government could enforce its policy by other, less intrusive means. At the outset, we note that in *Lee* the government prevailed, even under this analysis, in requiring the Amish, against their religious dictates, to contribute to the federal Social Security system. Moreover, *Yoder* and *Lee* explicitly excluded from their analysis legislation governing the public safety, peace, and order. Despite the Court's recent fragmentation of opinions in

[3]The Supreme Court has "long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210, 73 S.Ct. 625, 628, 97 L.Ed. 956, 961 (1953). *See also Fiallo v. Bell*, 430 U.S. 787, 792, 97 S.Ct. 1473, 1478, 52 L.Ed.2d 50, 56 (1977).

*Bowen v. Roy*, ___ U.S. ___, 106 S.Ct. 2147, ___ L.Ed.2d ___ (1986), the controversy there focused on whether to apply *Yoder* or a less-stringent standard to the collision between a free exercise claim and the receipt of federally funded welfare benefits. Justice Burger's opinion for the plurality in result, favorably cited *Reynolds*, which earlier rejected a free exercise challenge against laws prohibiting polygamy, and was not disputed on this point. Nevertheless, in an abundance of analytical caution, we reach the same result even under the *Yoder* test.

[4] First, it is not clear to us how enforcement of 8 U.S.C. § 1324 unduly burdens appellants' free exercise of religion. *See Braunfeld*, 366 U.S. at 606-07, 81 S.Ct. at 1147-48, 6 L.Ed.2d at 568-69. The statute relates only to conduct that aids or shelters illegal aliens and contains no explicit prohibition on religious practices or beliefs. The sincerity of appellants' religious motivation to aid El Salvadorans was not doubted by the trial court. Whether such motivation, in turn, required defiance of the nation's border control laws, hence, whether enforcement of those laws so as to inhibit and punish appellants burdened their religious practice, is another matter. Representatives of Catholic and Methodist clergy testified at the pretrial hearing and at trial. None suggested that devout Christian belief mandates participation in the "sanctuary movement." Obviously, appellants could have assisted beleaguered El Salvadorans in many ways which did not affront the border control laws: they could have collected and distributed monetary and other donations, aided in preparing petitions for legal entry and assisted El Salvadorans legally in this country, or, in the Christian missionary tradition, they could have performed their ministry in El Salvador or neighboring countries where El Salvadorans are refugees. They *chose* confrontational, illegal means to practice their religious views —the "burden" was voluntarily assumed and not imposed on them by the government.

[5] Second, contrary to appellants' assertions, there is a compelling state interest in the government's uniform enforcement of border control laws. The statute under which appellants were convicted is part of a comprehensive, essential sovereign policy. We cannot engraft judicial exceptions to the illegality of transporting undocumented El Salvadorans without thereby *de facto* revising, for the unique benefit of El Salvadorans, the legal condi-

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tions under which they may abide in this country. This result would create a preference utterly at odds with the fine balancing of national-origin quotas, visa preference tables, and alien residency requirements promulgated and enforced pursuant to the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. §§ 1101-1557 *passim*. The interest in uniform application of a facially neutral criminal law is acute: "To encourage individuals to make their own determinations as to which laws they will obey and which they will permit themselves as a matter of conscience to disobey is to invite chaos." *United States v. Moylan*, 417 F.2d 1002, 1009 (4th Cir. 1969), *cert. denied*, 397 U.S. 910, 90 S.Ct. 908, 25 L.Ed.2d 91 (1970). Finally, we emphatically reject appellants' suggestion that because enforcement of the border control laws has not been particularly successful, there is no compelling state interest in prosecuting violators. The argument is so broadly couched that it could be used to deny a compelling state interest in enforcement of the criminal drug laws. In any event, to the extent that appellants' conduct, amplified by the nationwide publicity given to the "sanctuary movement," has contributed to undermining compliance with the border control laws and encouraging illegal entries, appellants are trying to excuse their violation of law on the basis of other violations. This will not do. The compelling state interest becomes more compelling in proportion to the increasing magnitude of the violations.[4]

[6] The third prong of the *Yoder* test requires consideration of any less restrictive alternative means whereby the appellants' interest in upholding their religious beliefs may be accommodated within government policy. Appellants assert that criminalizing their efforts to abet the illegal entry of El Salvadorans is "almost never" the least restrictive means. They suggest as "less restrictive" the deportation of the alien or even confiscation of vehicles. Deporting the aliens, as an alternative policy, would reduce appellants' efforts to a pitiful farce. It would also implicate the Border Patrol in a wasteful "catch-me-if-you-can" scheme that would not further the law's objectives. Confiscation of vehicles would be a

[4] It is unnecessary to speculate whether, in abstract terms, illegal immigration can be judged good or bad for the country. Congress had determined the distinction between entry which is legal and that which is illegal. Neither appellants nor this court can be so bold as to revise the legislative determination.

futile remedy, imposing a tax on those who contribute to Merkt's and Elder's efforts, without, in all likelihood, diminishing the quantity of their efforts to evade the law. In short, appellants' proffered "less restrictive alternatives," by their very triviality, highlight the necessity for criminal sanctions.

An even more basic objection to requiring the government to adopt a less restrictive alternative that would protect the appellants' choice of religious practices is the open-endedness of their demand. Judge Head eloquently captured the ramifications of appellants' position in the following analysis:

> If the Government attempted to accommodate into its immigration policy [appellants'] religious beliefs, the Government's efforts would result in no immigration policy at all. As testimony from [appellants'] witnesses indicated, the moral obligation to assist others crosses religious and denominational lines. These widely-held belief allow adherents to exercise considerable discretion and would permit religious individuals to form personal immigration policies. . . . [Appellants wish] to limit this Court's view solely to the violence in El Salvador; however, the human condition remains miserable in many parts of the globe. Man's inhumanity to man, as well as nature's, has been unrelenting throughout history. Many people live on this planet who logically are no less worthy of [appellants'] Christian charity than the Salvadorans. The consciences of other religiously motivated may conclude that the starving and impoverished of North Africa, Asia, or Mexico are equally entitled to enter this country without review by the INS.

*United States v. Elder*, 601 F. Supp. 1574, 1579 (S.D. Tex. 1985).[5]

Appellants' "do it yourself" immigration policy, even if grounded in sincerely held religious conviction, is irreconcilably, voluntarily, and knowingly at war with the duly legislated border control policy. In this case, the claims of conscience must yield to the twin impera-

[5]Judge Vela adopted Judge Head's opinion in denying the appellants' motions to dismiss.

tives of evenhanded enforcement of criminal laws and preservation of our national identity as defined by the immigration laws.

II.

SUGGESTIVE IDENTIFICATION PROCEDURES

Elder and Merkt next assert that Mendez-Valle's pre-trial and in-court identifications were inadmissible because the photographic identification procedures were impermissibly suggestive and created a substantial risk of misidentification.[6] Prior to trial, the appellants moved to suppress the photographic identification evidence. After an evidentiary hearing, the district court found that the photo array of male suspects was not unnecessarily suggestive. With respect to Merkt, however, the court found the photo array to be "disastrous." The court nevertheless held that Mendez-Valle's indentification of Merkt was sufficiently reliable to outweigh the corruptive effect of the suggestive photographic array. At trial, Mendez-Valle made in-court identifications of both appellants.

[7] Evidence of a pretrial photographic identification will be inadmissible only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. *Simmons v. United States*, 390 U.S. 377, 384, 88 S.Ct. 967, 971, 19 L.Ed.2d 1247, 1253 (1968). Elder asserts that the male photo array was impermissibly suggestive because his photograph was the only one that even remotely resembled the very general description given by Mendez-Valle at the outset of the interview. We are unable to conclude that the district court was clearly erroneous in its determination that the male photographic array was not unnecessarily suggestive. *See United States v. Diecidue*, 603 F.2d 535, 565 (5th Cir. 1979), *cert. denied*, 445 U.S. 946, 100 S.Ct. 1345, 63 L.Ed.2d 781 (1980).

At the Border Patrol station in McAllen, Mendez-Valle described the man who had met and transported them to the Casa Oscar Romero as a tall man with a mustache who possibly wore glasses and had a name phonetically similar to "Mr. Mack" or "Mr. Yack."

[6] Roseles-Cruz was unable to identify the appellants from the photographs and could not identify them at trial.

(Elder is known as "Jack.") Mendez-Valle also indicated that, while in Mexico, he was aided by a religious organization. Based on this information, the agents compiled a photographic lineup. Because the agents did not have access to a regular photograph of Elder, they clipped his picture from a newspaper and included in the lineup pictures of other men also taken from a newspaper. In addition to the seven newspaper clippings were four "hard" photos of men, three of whom appeared to be of Hispanic descent.

Even excluding the four "hard" photographs, the remaining seven newspaper clippings depicted caucasian males of varying facial and feature characteristics but of the same general age and description. Three of the men in the newspaper clippings wore glasses, while two had mustaches. Mendez-Valle testified that no one suggested any certain photograph to him but that he pointed out Elder's photograph because "that looked very much like Mr. Mac." Based on these facts, the male photographic array was not impermissibly suggestive.

[8] The female photographic array consisted of eight "hard" photographs. Seven of the photographs were in color and depicted women of obvious Hispanic origin. Merkt was the only caucasian female in the array and her photograph was in black and white. The government concedes that the female photographic array was impermissibly suggestive. Nevertheless, the district court found that other factors weighed in favor of the reliability of Mendez-Valle's identification of Merkt and outweighed the effects of the impermissibly suggestive photo identification. We agree.

In *Simmons*, the Supreme Court held that if a photo array was unnecessarily suggestive, the court must then determine whether, under the totality of the circumstances, the suggestiveness leads to a substantial likelihood of irreparable misidentification. 390 U.S. at 384-86, 88 S.Ct. at 971-72, 19 L.Ed.2d at 1253-54. Under this analysis, "reliability is the linchpin in determining the admissibility of identification testimony." *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S.Ct. 2243, 2253, 53 L.Ed.2d 140, 154 (1977). *See United States v. Cueto*, 611 F.2d 1056, 1063-64 (5th Cir. 1980). A pretrial identification found to be reliable will be admitted despite an impermissibly suggestive photographic array.

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This Circuit relies on six factors to determine the reliability of a pretrial identification: (1) the opportunity of the witness to view the suspect, (2) the witnesses' degree of attention, (3) the accuracy of the pre-identification description, (4) the witnesses' level of certainty, (5) the time that has elapsed between the crime and the identification, and (6) the corrupting influence of the suggestive identification itself. *United States v. Woolery*, 735 F.2d 818, 821 (5th Cir.), *reh'g denied*, 740 F.2d 359 (1984), *cert. denied*, — U.S. —, 105 S.Ct. 1172, 84 L.Ed.2d 322 (1985). "[T]he fact that some, or even a majority, of the *Manson* factors weigh against the reliability of the identification is not conclusive. We must examine all of the factors and decide, whether, on the whole, the suggestiveness of the line-up created a 'very substantial risk of misidentification.' " 740 F.2d at 360-61 (quoting *United States v. Atkins*, 698 F.2d 711, 713 (5th Cir. 1983)).

1. *The opportunity to view the suspect.* Mendez-Valle testified that he saw Merkt a few times at the Casa Oscar Romero, that he asked her to purchase five bus tickets, and that he gave her $100. Mendez-Valle further testifed that, on November 21, 1984, Merkt gave him five bus tickets and drove the aliens to the bus station, which was approximately twenty minutes from Casa Oscar Romero. Mendez-Valle had the opportunity to view Merkt during the day at close range for substantial periods of time. *See, e.g., Woolery*, 735 F.2d at 821; *Passman v. Blackburn*, 652 F.2d 559, 570 (5th Cir. 1981), *cert. denied*, 455 U.S. 1022, 102 S.Ct. 1722, 72 L.Ed.2d 141 (1982); *Allen v. Estelle*, 568 F.2d 1108, 1113-14 (5th Cir. 1978).

2. *Degree of attention.* Mendez-Valle presented Merkt with what was probably a great deal of money to him. Merkt was the individual who paved the way for the aliens' journey to Houston. From these facts, we can conclude that Mendez-Valle's attention was often singularly focused on her. *See, e.g., Passman*, 652 F.2d at 570-71; *Swicegood v. Alabama*, 577 F.2d 1322, 1328 (5th Cir. 1978).

3. *The accuracy of the pre-identification description.* Mendez-Valle described Merkt as a short Anglo or light-skinned woman with curly or kinky yellowish-blond hair. He said her name was phonetically similar to "Daisy." Although perhaps general in terms of providing a "measuring stick" for comparison, this was an accu-

rate description of Merkt. Mendez-Valle did, in addition, provide an accurate description of Merkt's car. *See, e.g., Allen,* 568 F.2d at 1114.

4. *The witness' level of certainty.* Mendez-Valle testified that he picked Merkt's picture from the lineup "[b]ecause it looked very much like [Daisy]." At the evidentiary hearing, in response to a question by the court, Mendez-Valle testified that, even if he had not seen the picture of Merkt, he believed he would have been able to identify her. At trial, Mendez-Valle positively and unequivocably identified Merkt. *See, e.g., United States v. Jennings,* 528 F.2d 222, 223 (6th Cir. 1975). *Cf. Cueto,* 611 F.2d at 1064 (no in-court identification of the defendant).

5. *The time between the crime and the confrontation.* Mendez-Valle was asked to describe Merkt and identify her photograph only hours after the aliens had been placed on the bus. *See, e.g., Allen,* 568 F.2d at 1114. Thus, there was no substantial passage of time which could have affected the reliability of the identification.

Virtually all of these factors indicate a reliable basis for the identification. Because the suggestive photographic array did not create a substantial risk of an inaccurate identification, the pretrial identification evidence against Merkt was properly admitted.

Under the totality of the circumstances, Mendez-Valle's in-court identifications of Elder and Merkt were reliable also. Mendez-Valle testified as to the length of time he spent with each appellant and the conditions under which he viewed them. At trial, Mendez-Valle said that Elder resembled the man who had helped them and he positively identified Merkt. Defense counsel challenged the basis for both the pretrial and in-court identifications during his closing arguments. The credibility of those identifications was properly left to the jury. *See United States v. Fernandez-Roque,* 703 F.2d 808, 814 (5th Cir. 1983).[7]

[7]The appellants also assert that the identification procedures were impermissibly suggestive because Mendez-Valle and Rosales-Cruz were shown a video tape in which the female dominantly portrayed was Merkt. This video tape was only shown to the aliens after Mendez-Valle had already described Merkt and picked her photo from the lineup and after Rosales-Cruz was unable

## III.

## RECUSAL OF THE TRIAL COURT JUDGE

Prior to trial, Elder and Merkt moved for the recusal of the trial court judge, the Honorable Filemon B. Vela, pursuant to 28 U.S.C. §§ 144 and 455. The motion was denied by Judge Vela initially and upon reconsideration. On appeal, appellants assert that Judge Vela abused his discretion in refusing to recuse himself because (1) he had acknowledged his personal bias by recusing himself, upon his own motion, in another case in which Elder was the defendant, and (2) he improperly considered the truth of the matters alleged in affidavits submitted under § 144 rather than merely passing upon the legal sufficiency of those affidavits.

[9] A motion for recusal is committed to the sound discretion of the trial judge. The denial of such a motion will not be reversed on appeal unless the judge has abused his discretion. *See United States v. Harrelson*, 754 F.2d 1153, 1165 (5th Cir.), *cert. denied*, — U.S. —, 106 S.Ct. 599, 88 L.Ed.2d 578 (1985). Under both § 144 and § 455, the alleged bias or prejudice must be personal and it must stem from an extrajudicial source which would result in an opinion on the merits on some basis other than what the judge learned from his participation in the case. *See United States v. Reeves*, 782 F.2d 1323, 1325 (5th Cir. 1986).

Judge Vela's disqualification was not required under § 455 merely because he voluntarily withdrew from another case in which Elder was the defendant.[8] *See, e.g., Davis v. Fendler*, 650 F.2d 1154,

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to identify either Elder or Merkt. After viewing the video tape, Rosales-Cruz was still unable to identify anyone on the tape and Mendez-Valle again identified Merkt. In light of these facts, and our finding that the pretrial identification procedures were reliable, we cannot conclude that the video tape had any effect on the ability of the aliens to identify Merkt.

[8]Under § 455(a), a judge must disqualify himself in any proceeding in which "his impartiality might reasonably be questioned." Under § 455(b)(1), a judge must also disqualify himself where he has a "personal bias or prejudice concerning a party." If the evidence shows that a reasonable person "would harbor doubts about the judge's impartiality," the trial judge must disqualify himself. *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1111 (5th Cir.), *cert. denied*, 449 U.S. 820, 101 S.Ct. 78, 66 L.Ed.2d 22 (1980).

1163 (9th Cir. 1981). Judge Vela gave no reason for his withdrawal from that case, other than to state that it was "for none of the reasons urged by the Defendant in his Motions." In this case, Judge Vela considered, and specifically rejected, recusal based on his prior recusal. The appellants have not shown, by affidavit or otherwise, that Judge Vela's impartiality might reasonably be questioned or that he had a personal bias or prejudice against either Elder or Merkt or in favor of the government. These facts do not indicate that a reasonable person would harbor doubts about Judge Vela's impartiality based solely on his prior recusal. *See Phillips v. Joint Legislative Comm.*, 637 F.2d 1014, 1019-20 (5th Cir. 1981), *cert. denied*, 456 U.S. 960, 102 S.Ct. 2035, 72 L.Ed.2d 483 (1982).

Section 144 provides, in pertinent part:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

28 U.S.C. § 144. If an affidavit filed under § 144 is timely and technically correct, the factual allegations must be taken as true for purposes of recusal. The trial judge may pass only upon the legal sufficiency of the affidavit;[9] he may not consider the truth of the matters asserted therein. *Joint Legislative Comm.*, 637 F.2d at 1019 & n.6.

Merkt, in her affidavit, refers primarily to statements and rulings made by Judge Vela during her trial and sentencing in a previous case.[10] These prior judicial rulings, however, offer no basis for

[9] An affidavit is legally sufficient if it meets a three-part test: (1) the facts must be material and stated with particularity; (2) the facts must be such that, if true, they would convince a reasonable person that bias exists; and (3) the facts must show that the bias is personal, rather than judicial, in nature. *Joint Legislative Comm.*, 637 F.2d at 1019. *See Parrish v. Bd. of Comm'rs*, 524 F.2d 98, 100 (5th Cir.1975) (*en banc*), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 188 (1976). Each party may submit only one such affidavit. 28 U.S.C. § 144.

[10] *See United States v. Merkt*, 764 F.2d 266 (5th Cir.), *reh'g denied*, 772 F.2d 904 (1985).

recusal; they do not show any personal bias against Merkt. Elder's affidavit asserts prejudice on the basis of Judge Vela's prior recusal. We have already rejected this ground. Additional allegations center on the statements made by Judge Vela during the previous trial and sentencing of Merkt. Again, these prior judicial rulings do not show any personal bias.

Finally, the appellants assert that Judge Vela should have recused himself because of religious pressure. In support of this contention, Merkt refers to the affidavit of Diane Elder, the wife of John Elder. Diane Elder's affidavit violates the one-affidavit rule of 28 U.S.C. § 144 and need not be considered. *See United States v. Balistrieri*, 779 F.2d 1191, 1200 & n.6 (7th Cir. 1985) (a court need only consider the first affidavit submitted in support of a § 144 motion), *cert. denied*, — U.S. —, 106 S.Ct. 1490, 89 L.Ed.2d 892 (1986). Even if its filing were appropriate, Diane Elder's affidavit, based, as it is, on information told to her by unnamed individuals who did "not feel capable of giving affidavits," is legally insufficient to require the recusal of Judge Vela on religious grounds. *Id.* at 1199 (affidavits based on mere conclusions, opinions, or rumors are legally insufficient to require recusal). *See also Davis v. Comm'r*, 734 F.2d 1302, 1303 (8th Cir. 1984).[11]

## IV.

## COERCED TESTIMONY

The appellants timely moved to dismiss the indictment based on government coercion and misconduct. On appeal, the appellants contend that their fifth amendment right to due process was violated when the district court failed to hold an evidentiary hearing on the voluntariness of the testimony of the alien witnesses.

[10] It is established in this Circuit that "the admission at trial of

[11] Both appellants also incorporate, by reference, the affidavits of other individuals in support of their motion for recusal. In addition to violating § 144's one-affidavit rule, we note that these affidavits are also predicated on Judge Vela's religious background and his rulings in Merkt's previous trial, evidence no personal bias or extrajudicial prejudice, and are legally insufficient to require recusal.

a coerced out-of-court statement from a non-defendant may violate the defendant's right to a fair trial as guaranteed by the due process clause of the fifth amendment." *Merkt*, 764 F.2d at 274. *See also United States v. Chiavola*, 744 F.2d 1271, 1273 (7th Cir. 1984); *LaFrance v. Bohlinger*, 499 F.2d 29, 35 (1st Cir.), *cert. denied*, 419 U.S. 1080, 95 S.Ct. 669, 42 L.Ed.2d 674 (1974). The voluntariness of the statement of a witness is generally determined in a pretrial suppression hearing. *See, e.g., Merkt*, 764 F.2d at 273; *LaFrance*, 499 F.2d at 36. Here, however, defense counsel indicated that he wished to carry the motion with the case, and testimony was presented at trial regarding the voluntariness of the statements of Mendez-Valle and Rosales-Cruz.

The appellants first assert that Mendez-Valle's testimony was coerced with promises that he and the children would be sent to Washington, D.C., if he testified favorably to the government. At the outset of his testimony, Mendez-Valle stated that he wanted to request a "condition" from the government. At that point, the jury was excused and the proceedings continued. Mendez-Valle stated that, when he was detained, the government promised him that the children would be reunited with their parents in Washington, D.C. The government denied making any such promise but acknowledged that, when Mendez-Valle had asked what would happen to the children, he had been told that the children would be held until their parents could be located. At the time of trial, the children remained in the government's custody because no one had come forward to accept responsibility for them. Mendez-Valle stated that no other promises or threats had been made and the court ordered him to testify. On cross-examination, Mendez-Valle stated his belief that if he gave the Border Patrol agents answers that they liked, they would let them go to Washington, D.C. However, Mendez-Valle elsewhere indicated that, despite this belief, he nevertheless told the truth.

Appellants assert, based on the fact that the border patrol agents told the alien witnesses the names of the appellants, that the government impermissibly suggested specific testimony. While the agents did inform the alien witnesses of the names of the appellants, this was done only after the witnesses had described the appellants, after Mendez-Valle had picked both of the suspects from the photographic arrays, and after the aliens had both given

the agents their phonetic understanding of the names of the individuals who had helped them.

[11] The facts presented at trial did not warrant an evidentiary hearing. Neither witness claimed that he or she was threatened or coerced into making untrue statements. Other than concern for the children, both witnesses testified that no promises were made in exchange for their testimony. Furthermore, even if one of the government agents did bang his fist on the table twice while questioning Rosales-Cruz, as suggested by defense counsel, such actions would not lead this court to conclude that the entire trial testimony of the aliens should be excluded. In *United States v. Fredericks*, 586 F.2d 470 (5th Cir. 1978), *cert. denied*, 440 U.S. 962, 99 S.Ct. 1507, 59 L.Ed.2d 776 (1979), the defendant moved to exclude the testimony of an unindicted co-defendant. The witness' testimony was obtained in violation of her *Miranda* rights and, according to the witness' uncontroverted testimony, only after being subjected to threatening and heavy-handed interrogation. *Id.* at 477. Refusing to exclude the witness' testimony, this court held that the actions of the government officials, "even if viewed in the worst possible light, were a far cry from the sort of third-degree physical or psychological coercion that might prompt us to disregard altogether the societal interest in law enforcement by excluding the highly probative testimony of a nondefendant." *Id.* at 481. In this case, we can find no reason to exclude the trial testimony of the alien witnesses.

## V.

## EVIDENCE OF A PRIOR CONVICTION

Merkt was previously convicted of conspiring to transport, and of transporting, illegal aliens. *See Merkt*, 764 F.2d at 268.[12] That conviction was the subject of a motion *in limine*, which was granted to the extent that the government was required to get permission from the court prior to introducing evidence of that conviction. While cross-examining one of the defense witnesses, the prosecutor elicited testimony regarding the previous conviction without prior

[12]On appeal, this court reversed that conviction and remanded the case for a new trial. *Merkt*, 764 F.2d at 275. On remand, the government elected not to retry Merkt and dismissed the indictment.

approval of the court. The district court summarily found the conviction admissible under Fed. R. Evid. 404. The court carefully admonished the jury, however, as to the purposes for which the conviction could be considered. Merkt challenges the introduction of the prior offense evidence.

[12] Rule 404(b) provides that evidence of other crimes is not admissible to prove the character of a person in order to show that she acted in conformity therewith, but may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. The admissibility of extrinsic evidence is determined in light of the two-part test established by this court in *United States v. Beechum*, 582 F.2d 898, 911 (5th Cir. 1978) (*en banc*), *cert. denied*, 440 U.S. 920, 99 S.Ct. 1244, 59 L.Ed.2d 472 (1979): (1) it must be determined that the extrinsic offense evidence is relevant to an issue other than the defendant's character, and (2) the evidence must possess probative value that is not substantially outweighed by its undure prejudice.[13] A trial court's decision to admit extrinsic offense evidence will be rejected only for an abuse of discretion. *See United States v. Maggitt*, 784 F.2d 590, 597 (5th Cir. 1986).

Merkt first asserts that admission of evidence of the prior conviction was improper because the government was trying to establish her identity. This assertion is frivolous. The trial court, in admonishing the jury as to the limited use of the extrinsic offense evidence, cautioned that Merkt's previous conviction could be considered only in determining Merkt's state of mind or intent and "for no other purpose."

Merkt next asserts that admission of the extrinsic offense evidence as bearing upon her knowledge or intent is irrelevant because her sole defense in this case was misidentification. It is clear, however, that "Rule 404(b) evidence is particularly probative where the government has charged conspiracy." *United States v. Gordon*, 780 F.2d 1165, 1174 (5th Cir. 1986).

[13]The extrinsic offense evidence must also meet the other requirements of Fed. R. Evid. 403, which provides that, although relevant, extrinsic offense evidence may be excluded if it will confuse the issues, mislead the jury, or cause undue delay, waste of time, or needless presentation of cumulative evidence.

> "In the context of a conspiracy case, the mere entry of a not guilty plea sufficiently raises the issue of intent to justify the admissiblility of extrinsic offense evidence .... Only when the defendant affirmatively takes the issue of intent out of the case is he entitled to an exclusion of the evidence.

*Id. See United States v. Roberts*, 619 F.2d 379, 383 (5th Cir. 1980). Here, Merkt did nothing from which this court could conclude that she affirmatively took the issue of intent out of her case. *See, e.g., Id.* at 383 n.2 ("a defendant who intends to assert a defense based upon mistaken identity may make an appropriate stipulation to avoid the introduction of extrinsic offense evidence").

[13] Merkt also contends that a remand is mandatory because the district court allowed the admission of the extrinsic offense evidence without a prior on-the-record determination that the probative value of the evidence outweighed its prejudicial effect. In *United States v. Robinson*, 700 F.2d 205 (5th Cir. 1983), *cert. denied*, 465 U.S. 1008, 104 S.Ct. 1003, 79 L.Ed.2d 235 (1984), this court held that:

> [I]n Rule 404(b) cases an on-the-record articulation by the trial court of *Beechum's* probative value/prejudice inquiry [is warranted] *when requested by a party.* In the absence of on-the-record findings *in response to such a request*, we will be obliged to remand unless the factors upon which the probative value/prejudice evaluation were made are readily apparent from the record, and there is no substantial uncertainty about the correctness of the ruling.

*Id.* at 213 (emphasis added; footnote omitted).

*Robinson's* requirement of a prior on-the-record articulation of the probative value/prejudice analysis is only triggered by the request of a party. Here, defense counsel made no specific request for an on-the-record probative value/prejudice determination. Because the district court subsequently made the probative value/prejudice evaluation,[14] this contention, like the others, fails to per-

[14]Further, although the appellants do not specifically challenge the district court's post-trial findings, we find that the extrinsic evidence was relevant to

suade. *Cf. United States v. Lavelle*, 751 F.2d 1266, 1279 (D.C. Cir.) ("no reversal or remand is warranted unless the trial court refuses to make an on-the-record determination *in response to such a* request"), *cert. denied*, — U.S. —, 106 S.Ct. 62, 88 L.Ed.2d 51 (1985) (emphasis in original).[15]

## VI.

## REFUGEE STATUS

[14] Section 1324 makes it unlawful for a person to assist an alien who is "not lawfully entitled to enter or reside within the United States." 8 U.S.C. § 1324(a). The appellants assert that El Salvadorans, as nationals of a country torn by internal conflict, are "refugees" entitled to sanctuary in the United States and, thus, are not "illegally" within its borders. Since the aliens' status is an element of the crime charged, the appellants assert that whether the aliens are refugees entitled to remain in the United States is a question of fact which should have been submitted to the jury.

Appellants first contend that the aliens are entitled to "reside" in the United States pursuant to the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102. This inventive argument was previously rejected by this court in *United States v. Pereira-Pineda*, 721 F.2d 137, 139 (5th Cir. 1983). We are bound by our own precedent.

Appellants also assert that the United States' accession to the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967 [1968] 19 U.S.T. 6223, T.I.A.S. No. 6577, creates for all

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Merkt's knowledge or intent and that the substantive value of the extrinsic evidence outweighed its possible prejudicial effect.

[15]The admission of the extrinsic offense evidence prior to court approval was in violation of court order. However, the government actions did not rise to the level of prosecutorial misconduct. It appears from the record that the initial injection of the prior conviction information was inadvertent. The evidence was properly admitted under Fed. R. Evid. 404(b) and, thus, the appellants can show no prejudice. Further, the jury was carefully instructed on the limited purpose for which the evidence could be considered. While we in no way condone the government's misstep, the appellants suffered no harm and the prosecutor was properly reprimanded by the trial court.

"refugees" an "entitlement" to "reside" in the United States. Even though the Protocol bound the signatories to comply with the substantive provisions of Articles 2 through 34 of the United Nations Convention Relating to the Status of Refugees, 189 U.N.T.S. 150 (July 28, 1951), the Supreme Court has held that accession to the Protocol did not create new rights or substantially alter existing domestic immigration and refugee law. *See I.N.S. v. Stevic*, 467 U.S. 407, 417-18, 428-29 n.22, 104 S.Ct. 2489, 2494-95, 2500 n.22, 81 L.Ed.2d 321, 330-32, 336-37 n.22 (1984). *See also Bertrand v. Sava*, 684 F.2d 204, 218 (2d. Cir. 1982); *Pierre v. United States*, 547 F.2d 1281, 1288-89 (5th Cir.), *vacated and remanded for consideration of mootness*, 434 U.S. 962, 98 S.Ct. 498, 54 L.Ed.2d 447 (1977). Thus, even if the aliens are refugees, the Protocol does not permit them to "reside" here contrary to domestic law or for purposes of 8 U.S.C. § 1324(a).[16]

## VII.

## JURY INSTRUCTIONS

[15] To establish a violation of 8 U.S.C. § 1324(a)(2), the government must prove, *inter alia*, that the defendants acted willfully in furtherance of the aliens' violation of the law. *See Merkt*, 764 F.2d at 270. Although the appellants challenge the district court's refusal to give their proffered instruction on the "furtherance" element of the offense,[17] we find no reversible error in this instruction.

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[16]Amici urge this court to provide sanctuary, and thus legal status, to the aliens based on "custom" under international law. In enacting our refugee statute, however, Congress was not bound by international law, much less a purported "custom" of international law. *See, e.g., United States v. Quemener*, 789 F.2d 145, 156 (2d Cir. 1986); *United States v. Allen*, 760 F.2d 447, 454 (2d Cir. 1985); *United States v. Pinto-Mejia*, 720 F.2d 248, 259 (2d Cir. 1983), *modified on other grounds*, 728 F.2d 142 (1984).

[17]The appellants submitted the following instruction on "furtherance":

> The phrase "in furtherance of such violation" means that the conduct involved was done with the specific intent of furthering the individual's ability to remain in the United States in violation of law. It is not enough that the transportation was incidental to, or merely permitted the person to maintain his or her illegal presence here. In order to constitute "furtherance" in violation of 8 U.S.C. § 1324(a)(2), the transportation must be directly and substantially related to the individual's ability to avoid detection.

In *Merkt*, this court, for the first time, directly examined the requirement under § 1324(a)(2) that the defendant act willfully in furtherance of the aliens' violation of law. 764 F.2d at 271. This court held that:

> For the government to show that Merkt transported the aliens willfully "in furtherance of [their] violation of law," as the statute requires, it must show "a direct and substantial relationship between that transportation and its furtherance of the alien's presence in the United States." Willful transportation of illegal aliens is not, per se, a violation of the statute, for the law proscribes such conduct only when it is in furtherance of the alien's unlawful presence. The jury must be instructed that proof of this element of the offense is prerequisite to conviction.

*Id.* at 271-72 (footnote omitted). Here, the court instructed the jury that, in order to find the appellants guilty, it must find

> that the transportation of the alien was done willfully in furtherance of the alien's violation of law; that is, to further the alien's illegal presence in the United States. Just incidental transporting [of] an illegal alien will not make you guilty of that offense. It has to be something that furthers that person's illegal presence in the United States.

The court's instruction substantially covers the instruction requested by the appellants and, in substance, embodies the principles expressed in *Merkt*. While the court's instruction in this case does not use the words "direct and substantial relationship," the court's instruction makes clear that mere or incidental transportation of an alien is not sufficent to sustain a conviction under § 1324(a)(2). The court instructed that the jury must find that the transportation of the aliens was done willfuily and in furtherance of the aliens' illegal presence in the United States. When viewed as a whole, this instruction satisfies the text in *Merkt*. We find the appellants' remaining challenges to the jury instructions to be without merit.[18]

[18]The appellants' assertion that they were entitled to a good faith belief instruction is, in essence, a mistake of law defense which was foreclosed by this

## VIII.

## SUFFICIENCY OF THE EVIDENCE

[16] The appellants assert that the evidence was insufficient to sustain their convictions. Having reviewed all the evidence and the inferences which may be drawn therefrom in the light most favorable to the government, *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680, 704 (1942), we must conclude that it was sufficient to sustain the convictions of both Elder and Merkt.

AFFIRMED.

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court in *Merkt*, 764 F.2d at 273. *But see Merkt*, 764 F.2d at 275 (Rubin, J., dissenting). The appellants' assertion that they were entitled to a religious defense instruction has been foreclosed by our holding that they had no religious defense. Finally, the court's charge on conspiracy was adequate. *See United States v. Martin*, 790 F.2d 1215, — (5th Cir. 1986).

# IV

## Denial of Suggestion for En Banc Review

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 85-2264

---

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

STACEY LYNN MERKT and
JOHN B. ELDER,

Defendants-Appellants

---

Appeal from the United States District Court for the Southern District of Texas

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion July 17, 1986, 5 Cir., 198_,

_____F.2d____)

(September 4, 1986)

Before WILLIAMS, GARWOOD and JONES, Circuit Judges

PER CURIAM:

( ) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc,

(Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause enbanc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

_____
United States Circuit Judge

REHG-6

U.S. COURT OF APPEALS

F I L E D

9-4-86

V

Motion to Fifth Circuit to comply with rules regarding En Banc Review and Recall of Mandate denied.

U.S. COURT OF APPEALS
F I L E D
OCT 7, 1986
GILBERT F. GANUCHEAU
CLERK

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 85-2264

---

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

STACEY LYNN MERKT and
JOHN B. ELDER,
Defendants-Appellants.

---

Appeal from the United States District Court
for the Southern District of Texas

---

IT IS ORDERED:

that appellants' motion for recall of mandate, to vacate this Court's order of September 4, 1986 denying petition for rehearing and suggestion for rehearing en banc, and for an order directing the suggestion for rehearing en banc previously filed to be recirculated to all active Judges of the Court, etc., is Denied.

As the order denying petition for rehearing and for rehearing en banc stated, no

judge in active service requested an en banc poll, although all were fully notified of appellants' motion. Also, pursuant to 5th Circuit Local Rule 41.1, it is not this Court's practice to stay the mandate in criminal cases except in unusual circumstances, which are not present in this case.

Edith H. Jones,
U. S. Circuit Judge

VI

Extension to December 3, 1986 to file Petition for Certiorari granted by the Honorable Justice Byron White.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK

WASHINGTON, D. C. 20543

JOSEPH F. SPANIOL, JR.,
CLERK OF THE COURT

AREA CODE 202
479-3011

October 28, 1986

Stephen W. Cooper, Esquire
c/o Neighborhood Justice Center
500 Laurel Avenue
St. Paul, MN 55102

Re: Stacey Lynn Merkt and John B. Elder v. United States, A-308

Dear Mr. Cooper:

Your application for an extension of time in which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice White, who on October 28, 1986, signed an order extending your time to and including December 3, 1986.

A copy of the Justice's order is enclosed.

Very truly yours,
JOSEPH F. SPANIOL, JR., Clerk
By

Francis J. Lorson
Chief Deputy Clerk

vjr

Enc.

cc: Hon. Charles Fried, Solicitor General

Clerk, U.S. Court of Appeals for the Fifth Circuit

(Your No. 85-2264)

Supreme Court, U.S.
FILED
MAR 5 1987
JOSEPH F. SPANIOL, JR.

No. 86-1089

# In the Supreme Court of the United States

OCTOBER TERM, 1986

STACEY LYNN MERKT AND
JOHN B. ELDER, PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
*Solicitor General*

WILLIAM F. WELD
*Assistant Attorney General*

ROBERT J. ERICKSON
*Attorney*

*Department of Justice*
*Washington, D.C. 20530*
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## QUESTIONS PRESENTED

1. Whether the court of appeals correctly rejected petitioners' claim that the Free Exercise Clause barred their convictions for violating federal immigration laws.

2. Whether the evidence was sufficient to support petitioner Merkt's conviction for conspiracy to violate the federal immigration laws.

3. Whether petitioners' convictions should be reversed because they were the product of unreliable, coerced testimony.

4. Whether the district court improperly admitted into evidence identifications of petitioners based on impermissibly suggestive photographic identification procedures.

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# In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1089

STACEY LYNN MERKT AND
JOHN B. ELDER, PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. IV) is reported at 794 F.2d 950.[1] The opinion of the district court (Pet. App. I; see Pet. App. II) denying petitioners' motion to dismiss the indictment is reported at 601 F.Supp. 1574.

### JURISDICTION

The judgment of the court of appeals was entered on July 17, 1986 (Pet. App. IV). A petition for rehearing was denied on September 4, 1986 (Pet. App. V). On October 28, 1986, Justice White extended the time within which to file a petition for a writ of certiorari to and including December 3, 1986 (Pet. App. VII). The petition for a writ of certiorari was filed on December 2, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] Petitioners filed three separate versions of an appendix to their petition for a writ of certiorari. The contexts of the three versions are mostly duplicative. Our references to the appendix to the petition are to the most inclusive version.

## STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, petitioners were convicted of conspiring to transport illegal aliens within the United States (Count 4), in violation of 18 U.S.C. 371 and 8 U.S.C. 1324(a)(2). Petitioner Elder was also convicted on one count of conspiring to bring into and land in the United States illegal aliens (Count 1), in violation of 18 U.S.C. 371 and 8 U.S.C. 1324(a)(1), on two counts of landing illegal aliens (Counts 2 and 3), in violation of 8 U.S.C. 1324(a)(1), and on two substantive counts of transporting illegal aliens within the United States (Counts 5 and 6), in violation of 8 U.S.C. 1324(a)(2).[2] Petitioner Elder was sentenced to 150 days' imprisonment, to be served at a designated half-way house. Petitioner Merkt was sentenced to 18 months' imprisonment, with all but 179 days suspended in favor of three years' probation. The court of appeals affirmed (Pet. App. IV).

1. At trial, the government established that in November 1984, two adult El Salvadoran citizens, one male and one female, and three El Salvadoran juveniles unlawfully entered the United States. They entered by crossing the Rio Grande, and they were met by petitioner Elder on the American side (Pet. App. IV, at 7998). Elder then drove the aliens from the border to Casa Romero, a "refugee sanctuary" that he directed in San Benito, Texas, where the aliens stayed for approximately 15 days (*ibid.*). While at Casa Romero, the adult male alien, Jose Andres Mendez-Valle, became acquainted with petitioner Merkt, who was a staff volunteer there (*ibid.*). In mid-November, Mendez-Valle gave Merkt $100 to purchase bus tickets to Houston for the five aliens (*id.* at 8008). On November 21,

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[2] Petitioner Merkt was acquitted on two counts of unlawfully transporting illegal aliens (Counts 7 and 8).

1984, Merkt drove the five aliens to the bus station in McAllen, Texas, where they boarded a bus to Houston (*id.* at 7998, 8008).

Border Patrol agents subsequently arrested the five aliens en route to Houston at the Weslaco, Texas, bus station (Pet. App. IV, at 7998). The agents gave the aliens *Miranda* warnings, and after the agents learned that the aliens might have been smuggled into the country, the agents took the aliens to McAllen, Texas, for further questioning (*id.* at 7998-7999). At McAllen, Mendez-Valle generally described petitioners Merkt and Elder and he identified both from photographic lineups (*id.* at 7999). He also later identified both petitioners in court (*id.* at 7999, 8009). The adult female alien was unable to identify either petitioner (*id.* at 7999).

2. Prior to trial, the district court denied petitioners' motion to dismiss their indictment. Petitioners alleged, inter alia, that the Free Exercise Clause barred their criminal prosecution because their religious practices included providing shelter and transportation for Salvadoran aliens. Pet. App. I; Pet. App. II, at 3. The district court concluded that the federal government had demonstrated that any limitations on petitioners' religious beliefs were "essential to accomplish a compelling governmental interest" and "did not exceed the least burdensome method of accomplishing the Government's purpose without infringing First Amendment rights" (Pet. App. I; Pet App. II, at 4, 7-13 (citations omitted)).

During the trial, petitioners objected to the admission of Mendez-Valle's testimony in its entirety on the ground that his testimony was the product of prosecutorial misconduct, including bribes and threats (Pet. App. III, at iv). Petitioners also objected to the admission of Mendez-Valle's identification of petitioners on the ground that the identification procedures utilized by the government were impermissibly suggestive (*id.* at i-iii). The district court

denied both motions (Pet. App. III). The court concluded that the photographic identification procedures used in Mendez-Valle's identification of petitioner Elder were not impermissibly suggestive and that procedural problems with the identification of petitioner Merkt were overcome by other indications of the reliability of the identifications (*id.* at i-iii).

3. The court of appeals affirmed (Pet. App. IV, at 7995-8020). The court upheld the district court's rejection of petitioners' Free Exercise claim and its denial of petitioners' motion to exclude Mendez-Valle's testimony, including his identification of petitioners. The court of appeals also rejected petitioners' claim that the evidence was insufficient to support their convictions. *Ibid.*

## ARGUMENT

1. Petitioners claim (Pet. 1-9) that the Free Exercise Clause bars their convictions for violations of federal immigration laws, because their assistance to undocumented illegal aliens was prompted by their religious beliefs. They claim (*id.* at 6), moreover, that this Court's review is warranted because the court of appeals refused to apply a "strict scrutiny" test in determining the validity of petitioners' convictions, as required by *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), and *Sherbert* v. *Verner*, 374 U.S. 398 (1963).

Contrary to petitioners' claim (Pet. 9), the court of appeals did not hold that their convictions are "exempt from constitutional review" because the relevant criminal statutes concern federal immigration policy. Nor did the court of appeals fail to apply "strict scrutiny" analysis in evaluating the merits of petitioners' Free Exercise Clause claim. "[I]n an abundance of analytical caution," the court of appeals explicitly applied a strict scrutiny analysis. Under that test, the court held that the convictions were

valid, after assessing the burden imposed by the criminal statutes on petitioners' religious activities, the government's interest in uniform law enforcement, and the availability to the government of less burdensome means of achieving its objectives (Pet. App. IV, at 8002-8006).

First, the court of appeals correctly noted that the burden on petitioners' religion was not impermissible, because petitioners had, in effect, "voluntarily assumed" the burden (Pet. App. IV, at 8003). Although petitioners' criminal acts may have been prompted by their sincere "religious motivation" (*ibid.*), the evidence at trial did not support the conclusion that their activities were effectively compelled by their religion, as were the religious activities at issue in *Wisconsin* v. *Yoder* and *Sherbert* v. *Verner*. Hence, contrary to petitioners' claim (Pet. 2), this case does not involve a confrontation between federal criminal laws and petitioners' "non-avoidable duty to assist refugees." As the court of appeals pointed out (Pet. App. IV, at 8003), petitioners "could have assisted beleaguered El Salvadorans in many ways which did not affront the border control laws[,] * * * [but they] chose confrontational, illegal means to practice their religious views."[3]

Second, the court of appeals correctly determined (Pet. App. IV, at 8003-8004) that the federal government had demonstrated a "compelling state interest in the * * * uniform enforcement of border control laws" and that "engraft[ing] judicial exceptions * * * [for] El Salvadorans * * * would create a preference utterly at odds with the fine balancing of national-origin quotas, visa preference

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[3] Petitioners erroneously assert (Pet. 11 n.5) that the court of appeals improperly questioned the sincerity of their religious beliefs. The court of appeals simply drew the appropriate distinction between evidence establishing that certain conduct was religiously *motivated* and evidence establishing that the conduct was religiously *mandated*. The court concluded that only the former had been established in this case.

tables, and alien residency requirements promulgated and enforced pursuant to [federal immigration laws]." Contrary to petitioners' contention (Pet. 10, 12), therefore, the court of appeals described the specific harm that would be caused in this case by making an exception to the federal immigration laws. The court did not fail to identify a compelling governmental interest supporting the application of the immigration laws to petitioners' conduct.

Finally, the court of appeals correctly rejected (Pet. App. IV, at 8004-8005) petitioners' claim that criminalization of the federal immigration laws was impermissible because the government could achieve its policy objectives through "less restrictive means," such as the deportation of unlawful aliens or the confiscation of vehicles used in unlawful smuggling activities. As the court of appeals found (*ibid.*), the former "catch-me-if-you-can" scheme would not adequately meet the law's objectives, and the latter option would not diminish the efforts of individuals such as petitioners to evade the requirements of federal law.

2. Petitioner Merkt argues (Pet. 14-17) that her conspiracy conviction should be reversed because it was based exclusively on her association with other members of a religious community. Petitioner assumes (*id.* at 14, 15) that the only evidence supporting her conspiracy conviction was "the fact that she worked at the religious shelter," because the jury acquitted her on the other counts in the indictment. Therefore, she argues, the jury must have accepted her claim that she was "in no way involved in * * * transportation [of the illegal aliens]." It is well settled, however, that acquittal by a jury on certain counts is irrelevant to the inquiry whether the jury's conviction of a defendant on other counts was supported by sufficient evidence. "Sufficiency-of-the-evidence review involves assessment by the courts of whether the evidence adduced

at trial could support any rational determination of guilt beyond a reasonable doubt. This review should be independent of the jury's determination that evidence on another count was insufficient." *United States* v. *Powell*, 469 U.S. 57, 67 (1984) (citations omitted); see *Dunn* v. *United States*, 284 U.S. 390 (1932). Hence, rather than presume that the jury concluded that petitioner Merkt did not participate in the transportation of the illegal aliens, it is proper to consider all the evidence bearing on the conspiracy count, as the court of appeals did (see Pet. App. IV, at 7998, 8008). Whatever the jury's reason for acquitting Merkt on the substantive counts, it could properly have based her conspiracy conviction on the evidence that she had participated in the transportation of the aliens or at least was a party to the transportation scheme. This case therefore does not raise the issue whether Merkt may be convicted for conspiracy merely on the basis of her association with other members of a religious community.

3. Petitioners also claim (Pet. 18-23) that their convictions should be reversed because they were based on coerced testimony that the government obtained by offering Mendez-Valle the "promise of life" in exchange for his testimony against petitioners. As the court of appeals found (Pet. App. IV, at 8013-8014), however, the facts presented at trial did not establish that Mendez-Valle's testimony was the product of prosecutorial misconduct. Although the government advised Mendez-Valle that the children who accompanied him across the border would be reunited with their parents in this country, the government made no promises in exchange for his testimony (*ibid.*). Mendez-Valle, moreover, never claimed that he was coerced into offering false testimony (*id.* at 8014).[4] The

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[4] Petitioners also erroneously suggest (Pet. 22) that the government purposefully retained custody of the alien children during the trial in an effort to coerce Mendez-Valle into testifying for the government. As the court of appeals found (Pet. App. IV, at 8013), the children re-

district court did not err therefore in admitting Mendez-Valle's testimony into evidence.

4. Finally, petitioners contend (Pet. 24-31) that their convictions should be reversed because the district court improperly permitted Mendez-Valle to identify them at trial. The court of appeals correctly rejected that claim (see Pet. App. IV, at 8006-8009). The photographic lineup that included petitioner Elder was not impermissibly suggestive.[5] Although, as the government admitted in the court of appeals (*id.* at 8007), the photographic lineup that included petitioner Merkt was impermissibly suggestive, Mendez-Valle's identification was amply supported by other indicators of its reliability. That identification was therefore properly admitted. See *Manson* v. *Brathwaite,* 432 U.S. 98, 114 (1977); *Simmons* v. *United States,* 390 U.S. 377, 384 (1968).

Petitioners are wrong in asserting (Pet. 25-29) that there was no evidence supporting Mendez-Valle's identification and that the court of appeals improperly relied on factors that were the "direct product of the corrupting process." The court of appeals considered several factors that significantly bolstered the reliability of Mendez-Valle's identification: (1) Mendez-Valle had an ample opportunity

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mained in the government's custody at the time of the trial only because neither the parents nor a responsible guardian came forward until after the trial to take custody of them.

[5] The photographic lineup that was used for the identification of petitioner Elder included 11 photographs, seven of which, including a picture of Elder, were from newspaper clippings. As noted by the court of appeals (Pet. App. IV, at 8007), the photographs provided Mendez-Valle a fair cross-section of physical appearances; the seven newspaper pictures "depicted caucasian males of varying facial and feature characteristics but of the same general age and description. Three of the men * * * wore glasses, while two had mustaches." Mendez-Valle concluded that petitioner's picture "looked very much like" the individual who assisted the five aliens across the border (*ibid.*).

and incentive to focus on Merkt during the relevant period; (2) he provided a fairly accurate description of Merkt's physical appearance, her name, and her car prior to the photographic lineup and only a few hours after he had seen Merkt;[6] and (3) he identified Merkt positively and unequivocally both prior to and during the trial—indeed, he testified that he would have been able to identify Merkt in the absence of the photographic lineup. See Pet. App. IV, at 8008-8009. All of these circumstances bore on the reliability of the identification of Merkt and therefore were properly considered by the court of appeals. Because Mendez-Valle's accurate descriptions of petitioner Merkt's appearance, her name, and her car occurred prior to the photographic lineup, petitioners' claim that the court of appeals erroneously relied on the "direct product of the corrupting process" in admitting the identification is plainly without merit.

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[6] As noted by the court of appeals (Pet. App. IV, at 8008), Mendez-Valle accurately "described [Stacey] Merkt as a short Anglo light-skinned woman with curly or kinky yellowish-blonde hair. He said her name was phonetically similar to 'Daisy'." As further noted by the court (*id.* at 8006-8007), Mendez-Valle also accurately described petitioner Elder prior to the photographic lineup "as a tall man with a mustache who possibly wore glasses and had a name phonetically similar to 'Mr. Mack' or 'Mr. Yack.' (Elder is known as 'Jack.')."

## CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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